United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

APPENDIX

763

In the

UNITED STATES COURT OF APPEALS
for the District of Columbia

No. 23,601

Anthony R. Martin-Trigona,

Petitioner

v.

Federal Communications Commission and
United States of America,

Respondents.

American Broadcasting Companies, Inc.,
Columbia Broadcasting System, Inc.,
National Broadcasting Company, Inc.,

Intervenors.

PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

APPENDIX

The Appendix contains, in order of appearance, (1) Petition To Revoke License of WNBC-TV; since petitioner and the Commission agree that all three petitions are "substantially identical," only one is presented as indicative of the other two.(2) the decision of the Commission in dismissing the petitions. (3) the dissenting opinion of Commissioner Johnson.

In the argument, citattions to the Petition are noted as (Petition, p. ___); citations to the Commission decision are noted as (Decision, p. ___); citations to the dissenting opinion of Commissioner Jchnson are noted (Johnson,p.___) or (Dissent, p. ___).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ANTHONY R. MARTIN-TRIGONA Petitioner, v. WNBC-TV, CHANNEL 4 IN NEW YORK CITY, Licensee-Respondent	File No. _____

PETITION TO REVOKE BROADCAST LICENSE

Petitioner, respectfully requests, on the basis of the showing made herein, that the Commission revoke the broadcast license of WNBC-TV for anti-trust violations, conglomerate conflicts of interest, and undue concentration of media power in the New York City and national markets.

The Parties

Petitioner Anthony R. Martin-Trigona is a citizen of the United States residing at 507 W. Elm Street, Urbana, Illinois 61801. Petitioner has had extensive opportunity to study and investigate the anti-trust, conglomerate and concentration of media violations posed by the ownership of WNBC-TV by RCA Corp. (hereafter "RCA"), and is also a shareholder (one share) in RCA.

WNBC-TV is a television station licensed by the Commission to broadcast in the public interest on Channel 4 in New York City. Its principal offices are located at 30 Rockefeller Plaza, N.Y.C.(10020). WNBC-TV is one of the largest television stations in the country, broadcasting as it does to the leading television market and concentration of viewers in the United States. It is also the flagship of the NBC television network with which it is intimately associated and, as such, sets the national standard of NBC both by network direction and its tremendously influential example.

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Standing

Petitioner affirms that he is a proper party to initiate the instant action, based on his shareholder status, his specialized study of RCA corporate affairs, and as itemized below, and to represent a very significant segment of the public interest and public opinion in re control of the national broadcast media and violations thereof by existing licensees.

Petitioner also states that he is a viewer of television programs produced by NBC and WNBC-TV which programs are "networked" to Champaign, Illinois for retransmission on WICD-TV (Channel 15). "But for" the ownership of WNBC-TV, and the lucretive oligopoly profits which it provides to NBC, the programming availability and control and policies of the NBC television network and corresponding influence on viewing choices of petitioner would be significantly modified. This "but for" test of standing indicates that for NBC ownership of WNBC-TV, the local structure of the television industry in Champaign-Urbana, Illinois and nationally would be very different.

Inasmuch as WNBC-TV is the flagship of the NBC television network, and it is an in-house outlet of a national broadcasting organization, it must be subject to the same rigorous public interest requirements as to its controlling owner as are applied to other group and individual owners. If WNBC-TV were owned by the Mafia, for example, this would be grounds for revocation of the station's license. Likewise, if a station license is held by a parent corporation that uses and misuses the license for its own personal gain, then the fact the parent also happens to be a national network does not insulate it from an inquiry into its station operating practices and overall corporate guidance, by the Commission.

Commission action on renewal of a broadcast license must be a relevant inquiry reasonably related to the reality of the existing structure of the television broadcasting industry and the inherent power of a network owned and operated station (hereafter "O&O"). Petitioner requests that the Commission look behind the corporate

veil and examine the real substance of control in the case of WNBC-TV. The position of the Commission in the past has basically been "We do not have the power to regulate networks." In the narrow technical and legal sense this is correct. However, it is an incorrect interpretation of the supervisory power of the Commission, in that the license renewal power of the Commission does confer authority on the Commission to investigate network practices through examination of the parent corporation policy in its capacity as an O&O licensee.

Finally, petitioner states that standing for this complaint is predicated on the basis of independent "public interest" standing which exists regardless of petitioner's residence, location or relationship to the licensee (i.e., an "ombudsman" status intervention). This inherent standing exists because all licensees must operate at the necessity and conveience of the American public and have an affirmative, non-delegable duty to operate in the national public interest. To the extent that any licensee does not operate in the public interest, a public interest cause of action for revocation of a license can be asserted by any member of the public. The Commission has recognized this general public interest standing to intervene in license renewal proceedings when, in response to a complaint by a Washington, D.C. resident, John F. Banzahf III, complaining of an Indianapolis television station (WFBM-TV), it stayed renewal of Time-Life licenses in California. This was also recognition of the principle that in the case of group or multipe station owners, standing requirements must be interpreted liberally to conform with the national and nation-wide broadcasting influence of these colossal corporate licensees.

Basis of Petition

NOTE: Petitioner raises three major issues for inquiry by the Commission; however, while some detail is provided as to the specific charges and violations which Petitioner feels the Commission should investigate, detailed citation of cases, authorities and precedents is left for the actual license renewal hearing at which time Petitioner proposes to offer a full evidentiary presentation of his facts, data and evidence in support of the petition.

There are three main issues which compel revocation of the license of WNBC-TV. These are the existing anti-trust violations posed by ownership of WNBC-TV by NBC and the problems associated thereof; (2) the concentration of media problems, violations and restraints posed by ownership of WNBC-TV by NBC; (3) the conglomerate and conflict of interest problems and violations posed by ownership of WNBC-TV by NBC.

NOTE: The Commission has pending rulemaking on multiple ownership restrictions, the so-called one-to-a-customer proceeding (33 Fed. Reg. 5315 (1968), and has also issued a Notice of Inquiry concerning ownership of broadcasting stations by conglomerates (Docket No. 18449, Adopted February 7, 1969). It does not appear to have any study in progress on specific anti-trust violations by O&O network stations. Petitioner does not feel that his Petition to Revoke is superceded by the proposed rule making or notice of inquiry. The Commission has been known in the past to have such speculative proceedings pending for years without final action (q.v. the "50-50" rule) because of procedural pressure from the broadcasting industry. In the case of a license renewal challenge, the Commission is in a position to make an adjudication instanter as to the merits of any individual case. This inquiry can be made independent of any pending rule making, particularly since setting a license renewal application for hearing is not in iteself a Commission decision which is susceptible to procedural delay or external pressure. The Commission has recognized this special advantage of the license renewal procedure, especially recently in setting for hearing applications of KRON-TV (San Francisco) and WCCO-TV (Minneapolis). Even under the restrictive standards for renewal hearings suggested by Commissioner H. Rex Lee, that essentially "anti-competitive practices" as well as "concentration" questions must be present for a renewal hearing (Broadcasting Magazine, March 24, 1969, p. 64, column 3) it would appear that the instant license should and can be set for hearing.

Petitioner can establish, further, that independent of any proposed or pending rule making before the Commission, the WCBS-TV license should be revoked, on the basis of existing laws and policies. It is also evident that certain motivating preconditions or factors behind the proposed multipe ownership rules are questionable and possibly unconstitutional in themselves (proposed amendments to § 73.35, 73.240, 73.636, specifically the provision that the criteria will "not be applied so as to require deinvestiture. . .") The prospective application of such rules would appear to be ultra vires to the powers of the Commission. A licensee holds a mere public trust for a three year period. There is no compelling public interest that existing licensees be given perpetual waiver of regulations which are periodically revised, and there is a compelling public interest that all licensees conform to existing regulations at the beginning of each three-year renewal period. To permit a policy of prospective application is to recognize a <u>de facto</u> property interest in the licensee which is clearly contrary to public ownership of the air waves. The Commission, by its actions, cannot be seen to offer the advantages of property ownership to licensees when such ownership is prohibited,

> especially when de novo compliance is possible in each renewal application. In view of the questionable legality of the proposed Commission rule making and the established Commission policy of isolating issues of crucial importance for consideration of license renewal time, there does not appear to be any substantive or procedural reason why the subsequently enumerated issues cannot be examined and adjudicated in the license renewal context.

First Issue (anti-trust)

WNBC-TV ownership by NBC stands as an egregrious example of a major corporate licensee operating in violation of anti-trust requirements, both as regards to a lessening of competition in an industry (i.e., the television broadcasting and networking industry) and as regards to actual economic power being used and tending to create a monopoly-oligopoly. In essence, all three national networks are operating in violations of, inter alia, the Act of July 2, 1890, and the Act of October 14, 1914, (15 U.S.C.A. § 1,15) and all acts amendatory thereto, commonly known as the Sherman and Clayton Acts.

NBC owns five major market VHF television stations with an estimated audience reach of 38 million persons, or roughly 19% of the total population of the United States. The five NBC O&O's cover 19% of the United States; the other 201 NBC network affiliates cover the remaining approximately 81% of the national population, for an average station-population reach of .4% (roughly 800,000 viewers) vs. an average NBC O&O's reach approximately nine times as many viewers, individually, as their average affiliate. Court decisions have held that far less concentration than 19% of an industry is sufficient to constitute a restraint against trade when the industry as a whole is made up of small producers (which a television station is). Clearly, NBC, controlling access to 19% of the nation's television audience through its O&O's, with almost 50% of this total coming from WNBC-TV, constitutes a major monopolistic-oligopolistic factor in the television broadcasting industry.

Because NBC owns and operates individual stations, as well as controlling the national NBC television network, it is impossible to determine if television networking represents a consistently

profitable, accepted (by the public), acceptable, advisable or otherwise desirable product and function of the television entertainment industry. NBC station profits are being used to augment and subsidize entry in another industry (networking) which is pressed for new entrants because of the unfair competitive advantage enjoyed by the existing systems. If network ownership were separated from concomitant station ownership, and all networks were on a potentially equal basis as to their competitive relationship, the number of national networks could be expanded to realize a long articulated policy of the Commission as to program and source diversification (q.v. 33 Fed. Reg. 5315 [1968]). With WNBC-TV in New York to use as a bookkeeping conduit and siphon for network revenues, and apparently substandard network "book" profits, the Commission would only be funding and subsidizing continued restraint of trade in the television network business by renewing the license of WNBC-TV to NBC. O&O profits have clouded the true economic and public interest worth of television networking and deprived consumers of the free economic and entertainment choice as to whether networks constitute a socially desirable programming service and corresponding concentration of economic power. Petitioner contends that as a matter of anti-trust law and public interest consideration and the existing 19% national reach of the NBC O&O stations, continued ownership of WNBC-TV by NBC-RCA is incompatible with the above articulated considerations.

Further, NBC not only owns television stations and operates a national television network, it also produces television programs, syndicates reruns, and helps finance motion picture production. RCA also owns the publishing house of Random House, and the RCA records division. Not only are such varied and diverse interests funded by television monopoly-oligopoly profits, it is a classic example of accretion leading to widening violation of anti-trust considerations (networking, station ownership, manufacturing and publishing expansion, motion picture production for the captive NBC network, etc.) There is no more contradictory nor scandulous concentration

of economic power and activities that RCA could be engaged in, when weighed against its public service requirements and free market competition in the entertainment industry. As a matter of long-standing precedent, ownership of motion picture production and exhibition facilities (i.e., in the case of CBS, exhibition on the television network) has been incompatible with anti-trust policy interests (q.v. U.S. v. Paramount Pictures, 334 U.S. 131, 68 S. Ct. 915 (1948)). When the anti-trust implications of financing motion picture production and exhibition are coupled with a similar stranglehold on television production and exhibition over the captive NBC television network, the gross and far ranging boundries of the monopoly implications are perceived.

In addition, ownership of WNBC-TV by a parent corporation which also operates a national radio network is also contrary to the public interest and anti-trust requirements. Ownership of competitive media networks by the same company, in addition to its own competitive media license holdings, tends to produce conditions which effectively restrict competition from potential competitors. It is significant that in the most comprehensive expansion of broadcasting service in history (1945-date), the three national networks have retained a virtual monopoly position in their operations and other actual or potential competitors have failed to make any significant indentation. This is not so much the result of omniscient corporate management as it is a regulatory policy which allows a licensee to own and operate stations, networks, and in addition, to expand into motion picture production and other entertainment related activities. It is also significant that economic power is so concentrated in the broadcasting industry that no one seriously considers starting a fourth national network; potential investors always speak of acquiring poorly managed and anemic ABC as the weakest of the three national oligopolies.

Because of the peculiar structure of the television broadcasting industry, where the $3 billion industry is dominated by three companies with 15 owned stations, the words monopoly and oligopoly are used

relatively interchangably to reflect the reality of economic conditions. NBC is obviously not a monopoly in the strict sense of the word, since it has two competitors; but to the extent it engages in monopoly practices (ownership of stations and networks, and punative motion picture production, and diversification in defense contracting, Random House and other activities) RCA-NBC represents a monopoly grafted on an oligopoly.

In terms of reallocation of WNBC-TV to another licensee, and the present probable annual profits in excess of 100% on invested capital, it is clear that the Commission could award Channel 4 to just about any group of responsible individuals who could then make a substantial profit and also serve the public interest. To allow such a lucretive public asset (Channel 4) to be used to aggrandize a corporate empire and fuel expansion into unrelated activities wrongs not only the viewers of New York City, who are denied access to another (and, indeed, a first) locally owned and operated station, but also national viewers as well who are denied access to more program diversity and sources because of NBC's monopoly position, subsidized and reinforced by ownership of WNBC-TV.

Second Issue (concentration of media)

NBC owns three full-time maximum power licenses in New York City. All three licenses are palpably used to enhance the profit potential of network operations and are operated in the best interests of the NBC corporate structure, not the public interest. Together with its competitor networks, the group owns 9 full-time maximum power licensees in New York City. Ownership of the three full-time stations in New York inhibits growth and development not only of local program service and local license ownership, but also of competitive network service. It would be almost impossible for a new competitor to overcome the structural advantage of the existing networks with their free public O&O profits to fend off any challenges. Furthermore, ownership of "flagship" stations for both television and radio inhibits the joint and several development of both media. Not only does NBC control the

existing network apparatus for both television and radio (and in the case of radio, record production and distribution facilities as well), but NBC controls the most desirable market licenses, creating a situation which is calculated to dissuade new competition in such a monopolistically structured industry. The structure and dissuasion come not because of any corporate acumen, but because of licenses furnished free to NBC by the public.

Nationally, NBC owns 17 full-time stations, including TV stations in the nation's top three markets. Looked at in conjunction with ownership of competing networks, this concentration of media power tends to further discourage competition and in fact, because of structural limitations in the spectrum, to "lock in" the existing national networks in perpetuity. The Commission is already aware of the coercive effects of undue market power in proposing its long-standing "50-50" rule making.

Clearly, NBC fails to sustain any convincing burden of proof of operating WNBC-TV in the overall public interest both as to concentration of media power and powership of competitive media. Nationally, NBC controls 17 major market licenses and has affiliation agreements with hundreds of stations. WNBC-TV and the other O&O's provide a protective profit penumbra behind which the RCA-NBC corporate complex has increased its power and expanded the scope of its activities in areas totally unrelated in broadcasting. The public interest would be better served, both locally and nationally, if the currently network-owned stations in New York were "freed" and allowed to choose affiliation or programming service independently of parent corporation network policy.

Third Issue (conglomerate interests)

Derivative from and associated with NBC's antitrust and public policy violations and concentration of media power are the very real problems posed by internal conflicts in the NBC organization. RCA-NBC is a defense supply, entertainment and related activity conglomerate which has used television-radio profits to expand in numerous directions.

What is more significant, and more difficult to discern on first sight, is the great conflict between being a national news and programming source, and being a secret defense contractor at the same time. NBC must "censor" its news if it is to please its Department of Defense customer; significant and a particularly good instance thereof, is the case of the RCA defense products being used in Viet-Nam. It is virtually impossible for a company which derives financial sustenance from the war, and which also relies on government cooperation for prime licenses, not to be swayed by the countervailing (to the public interest) pressures of the military-industrial complex. It is impossible for NBC to air local or network editorials in opposition to the Viet-Nam war, or to make other observations on the folly of a massive military-industrial establishment to placate defense contractors, when NBC itself is one of those contractors. A company which is developing and providing defense products for the government cannot render an impartial view on government policies which involve the nation in distant wars and domestic dissension. NBC can of course make pro forma editorial and news presentations, but it cannot make a genuine contribution to unbiased and meaningful national debate when it has a division serving the needs of the military-industrial complex and which is actively supporting government policy with armaments and weapons systems.

In deciding to grant a license renewal to WNBC-TV, the crucial issue is not whether NBC may have operated the station in compliance with minimum public service requirements, in effect providing mechanical pro forma data on renewal applications, but rather an examination of what the competitive and countervailing advantages accruing to the public both locally and nationally would be from a locally owned New York station which was not the captive of a national network or group broadcaster. It is a more than a remote possibility that a "free" New York channel could develop into a significant national voice and provide national syndication of programs all on its own.

It is clear that under the existing corporate structure of RCA-NBC, management has its hands full overseeing activities from computers to book publishing, in addition to station and network ownership and management, as well as defense contracting, manufacturing and record production, and that RCA-NBC as a corporate entity is unable to devote full and substantial attention to the major function and responsibility of a broadcast licensee: serving the public interest in the direct operation of the station license.

To the extent that NBC owns five VHF television stations, and most major NBC network affiliates are VHF stations as well, this has tended to discourage UHF tuner "parity" in receivers produced by RCA, and even today UHF reception remains inferior, thus benefiting the VHF stations of the NBC network.

Not only does the corporate conglomerate status of NBC affect entry into the broadcasting industry, but in publishing, computers, manufacturing and now movie production as well. The guaranteed (almost) profit potential of New York VHF license is not being used to serve the necessity and convenience of the American public; it is being used to finance NBC corporate conglomerate ventures which are in most instances totally unrelated or incompatible with the public interest requirements of a licensee. Clearly, as in the case of one-bank holding companies having other business interests, it is evident that essentially public service corporations with the inherent protections of legally restricted market entry and technical limitations (in the case of radio and television) should not be allowed to speculate in unrelated and incompatible activities which do not serve the genuine and direct public interest of the station license itself.

Basis for Relief

Petitioner feels that even based on an interpretation of the disputed issues which gives NBC the benefit of every possible doubt, the weight of the evidence and the public interest require that the license of WNBC-TV be revoked.

Petitioner respectfully requests a hearing on these matters and only these matters be set for the earliest possible date,bearing in mind that any decision of the Commission is bound to be appealed to the courts and thus delaying a final resolution on the license. If the Commission should rule that the entire broadcast record of WNBC-TV must be considered, then Petitioner respectfully reserves the right to amend and supplement this petition to provide additional information and respectfully allege the following areas in which the licensee-respondent fails to serve the public interest;

1. Failure to present programming genuine responsive to the needs of racial minority groups and programming which genuinely and accurately reflects the widening gap between minority group and majority group economic status.

2. Failure to present programming critically exploring areas of public importance and concern where the interests of advertizers and potential advertizers, or its own corporate conglomerate interests, might be adversely affected.

3. Unimaginitive, uninteresting, unentertaining programming.

4. Misleading program practices.

5. Excessive commercials, often presented so as to disrupt and detract from the principal programming.

6. Failure to fulfill its obligations under the fairness doctrine with respect to controversial issues of public importance.

7. Excessive use of movies in prime time programming, thus depriving viewers of fresh programming not available from alternative program and entertainment sources.

Petitioner feels that pro forma renewl of WNBC-TV's license would be an arbitrary and capricious exercise of the administrative and supervisory power of the Commission. Pro forma renewal of conglomerate network major market licenses tends to encourage, indeed abet, violations of anti-trust law, and to ignore any reasonable standard of public interest necessity and convenience in awarding crucial broadcast licenses.

Prayer

Petitioner prays that the Commission set this matter for hearing at its earliest convenience and that, after hearing all of the evidence, it revoke the broadcast license of WNBC-TV.

Respectfully submitted,

Anthony R. Martin-Trigona
Box 2058 Station A (mailing)
Champaign, Illinois 61820
(217) 367-1668

ANTHONY R. MARTIN-TRIGONA, being first duly sworn, personally appeared before me and stated as follows:

(1) that the above is his signature;

(2) that he has read the above Petition to Revoke Broadcast License and the same is true to the best of his knowledge, information and belief;

(3) that he has served a copy of this petition on WNBC-TV at 30 Rockefellar Plaza, New York, New York 10020

NOTARY

SEAL:

DATE: May, 1969 MY COMMISSION EXPIRES:

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 69-1041
36907

In re Applications of	)	
NATIONAL BROADCASTING COMPANY New York, New York	)	File No. BRCT-1
For Renewal of License of Station WNBC-TV, New York, N. Y.	)	
COLUMBIA BROADCASTING COMPANY New York, New York	)	File No. BRCT-3
For Renewal of License of Station WCBS-TV, New York, N. Y.	)	
AMERICAN BROADCASTING COMPANY New York, New York	)	File No. BRCT-7
For Renewal of License of WABC-TV, New York, New York	)	

MEMORANDUM OPINION AND ORDER
Adopted September 24, 1969 ; Released October 13, 1969

By the Commission: Commissioner Cox concurring in the result; Commissioner Johnson dissenting and issuing a statement; Commissioner H. Rex Lee absent.

1. The Commission has before it: (1) three substantially identical pleadings entitled Petition to Revoke Broadcasting License directed against the three network owned-and-operated television stations in New York, the so-called network "flagships", filed by Anthony R. Martin-Trigona on May 28, 1969; (2) letters of response from NBC, CBS and ABC dated June 11, June 17, June 16, 1969, respectively, and; (3) letters of comment on those responses from Mr. Martin-Trigona. Since the three applications for renewal are still pending, we shall treat these petitions as petitions to deny the renewal applications.

2. Petitioner Anthony R. Martin-Trigona identifies himself as a citizen of the United States and a resident of Urbana, Illinois. He states, without further clarifying comment, that he has had "extensive opportunity to study and investigate the antitrust, conglomerate and concentration of media violations posed...." by the ownership of the above-referenced New York television stations by the three national networks. He

also asserts that he is a shareholder--to the extent of one share--in CBS, RCA and ABC. He affirms that he has standing as a party in interest to file these petitions by virtue of his shareholder status, "his specialized study" of NBC, CBS and ABC corporate affairs and because he is a "viewer" of television programs produced by the three networks and broadcast by their affiliates in Illinois. Martin-Trigona predicates his standing, in part, on what he calls the "but for" test; "but for" the ownerships of WABC-TV, WCBS-TV and WNBC-TV" "and the lucrative oligopoly profits" which such ownership gives the respective networks, he says, the programming and policies of the networks would be "significantly modified".

3. Petitioner's final basis for the claim of standing he says

> "is predicated on the independent 'public interest' standing which exists regardless of petitioner's residence, location or relationship to the licensee (i.e. 'ombudsman' status intervention). This inherent standing exists because all licensees must operate at the necessity and convenience of the American public and have an affirmative, non-delegable duty to operate in the national public interest. To the extent that any licensee does not operate in the public interest, a public interest cause of action for revocation of a license may be asserted by any member of the public."

Petitioner asserts that the Commission recognized this "general public interest standing" when it stayed the renewal of Time-Life licenses in California at the request of John F. Banzhaf III. In that case, however, the Commission did not reach the question of Mr. Banzhaf's standing when it dismissed Mr. Banzhaf's petition as moot on March 31, 1969. Petitioner cites no other cases or authority to support his claim of standing. Each of the networks individually allege the petitioner lacks standing as a party in interest.

4. The issue of standing in this case is concerned with the principles set down by the Court of Appeals in Office of Communications of United Church of Christ v. FCC, 359 F 2d 994, 1001-1002 (CADC, 1966). That case established that the responsible representatives of the listening public in an area had standing to

challenge the renewal of license of the stations serving the area, and further stated that the Commission might adopt appropriate regulations in this field to delineate which challengers represent responsible community groups or organizations. We believe that Mr. Martin-Trigona lacks standing to challenge the renewals in question. The stations which he views are Illinois stations, not these New York stations. Of course, these Illinois stations present network programming, but they remain fully responsible for all programming presented. For example, fairness questions or questions of excessive commercialization remain the full responsibility of the individual licensee. To the extent that petitioner bases his standing on challenges concerning the programming he has been receiving, such challenges should be directed to the stations from which he is receiving service. To the extent petitioner bases his challenge on the above-described "but for" argument (i.e., "but for" the network's ownership of these New York stations, petitioner would obtain different and better program service), we note that petitioner has not met the burden imposed upon him by Section 309(d), of showing that a grant or denial of license renewals to these three New York stations would affect the programming viewed by him; that he has simply made a bare allegation in this repect. Elimination of all networking would of course affect the programming received by petitioner, but here again there is no showing that such a drastic occurrence would benefit petitioner or the millions of viewers of network television. Finally, a denial of license would not benefit petitioner as a shareholder of these companies. We find that Martin-Trigona has not demonstrated that he has standing as a party in interest in this matter. We will, however, briefly discuss the petitioner's claims, since as we have stressed, we welcome and examine complaints from the listening public in line with the statutory obligation. (See Section 311(a)).

5. The Petitioner's complaints break down into three main headings: (1) antitrust violations; (2) conglomerate conflicts of interest, and (3) undue concentration of media power in New York City and in the national market. 1/ Additionally, CBS and ABC are accused of fairness doctrine violations concerning unspecified controversial issues of public importance and all three networks are accused of excessive commercialization, excessive use of movies in prime time, misleading program practices, failure to program to the needs of racial minority groups and failure to program in areas where "the interests of advertisers and potential advertisers, or /their/ own corporate conglomerate interests might be adversely affected". All networks, the petitioner alleges, present "unimaginative, uninteresting and unentertaining programming" and CBS is singled out for presenting "geriatric" programming and for "objectionable censorship such as the Smothers Brother Comedy Hour which detract and vitiate from any social commentary".

1/ The petitioner prefaces these charges with this statement: "If the Commission rules that the entire broadcast record of /these stations/ must be considered, then the petitioner respectfully reserves the right to amend and supplement this petition to provide additional information...."

6. The petitioner has nowhere set forth facts that show the networks to be in violation of any law, Commission policy or rule. Ownership of the New York stations is consistent with our rules and our policy, and indeed flagship stations may be necessary to networking, which in turn provides great public benefits. 2/ For the most part, petitioner's pleadings recite conclusions, not factual allegations. They are replete with pejorative language, highly individual opinions and unsupported and unsubstantiated accusations. The petitioner has not made any showing as to how the grant of these renewals would be prima facie inconsistent with the public interest, convenience and necessity. On the broadcast policy questions of multiple ownership and conglomerate control of licensees, the Commission has issued public notices and instituted rule making proceedings, and is thus exploring the general issues in this important area. This does not mean that we should, or would, ignore serious questions raised in individual proceedings, and, as shown by recent actions, we have not done so. But no such showing of serious questions is made here; rather there is an absence of any specific showing of abuse, law violation or discernible overriding public interest concern. 3/

7. With regard to the petitioner's programming criticisms, it has long been our policy that the selection and presentation of programming material is essentially a matter within the sound discretion of the individual licensee. It is not our function to make artistic value judgments as to the worth or demerits of a given entertainment program. We cannot properly deal with the blanket charge that network programming is "unimaginative", "unentertaining" or "geriatric". The fairness doctrine question raised by

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2/ We shall not repeat here the policy rulings which we have made in the network field, concerning both the basis for viable networking and the benefits derived therefrom.

3/ Petitioner's assertions of alleged violations of law are no more than that. For example, petitioner asserts that NBC uses profits from its owned and operated stations, including WNBC-TV, to augment and subsidize its network activities and thus excludes new network entrants because of this unfair competitive advantage. But, petitioner has made no substantive showing in this respect. Based on our own experience, we believe that network ownership of stations is important to effective networking, which in turn serves the public interest. But again, our experience leads us to believe that it is not network ownership of stations which blocks development of new networks; after all, there are other multiple owners with stations in the larger markets, and we have stated our willingness to consider waiver of our multiple ownership policies, if we had some assurance that such waiver would result in a fourth network. The main obstacle, as we see it, is the difficulty of entering the field in light of the limited number of presently prized VHF stations in many markets available for affiliation to any new network. (See legislative history of 1962 all-channel law, H. R. 1559, 87th Cong., 2d Sess., pp. 3, 4 (S. Report No. 1526, 87th Cong., 2d Sess., pp. 4, 7.))

the petitioner is similarly not litigable. The fairness doctrine necessarily deals with specific controversial issues of public importance, not vague and formless generalities. Here, the petitioner is silent as to what controversial issues were allegedly involved, what specific views were aired and what basis he has for the belief that fairness was not achieved.

8. Because the petitioner has not demonstrated that he has standing as a party in interest, IT IS ORDERED That the "Petition to Revoke Broadcasting License" directed against the three stations listed above is DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

Martin-Trigona

[In re Application of National Broadcasting Co., Columbia Broadcasting System, and American Broadcasting Company for Renewal of New York Licenses]

Dissenting Opinion of Commissioner Nicholas Johnson

Anthony R. Martin-Trigona has petitioned this Commission to revoke the licenses of the three network owned-and operated television stations in New York City. He asks that the Commission revoke the licenses of these "flagship stations" because of "antitrust violations, conglomerate conflicts of interest, and undue concentration of media power in the New York City and national market." These charges are serious ones. The Commission, in ordering a study of conglomerate broadcasters, 16 F. C. C. 2d 436 (1969), has recognized that a problem exists, but here summarily dismisses petitioner's contentions. The majority apparently justifies the dismissal upon petitioner's lack of standing, but, perhaps as a sop to a reviewing court, the merits are mentioned and quickly rejected.

Standing. Petitioner has alleged four bases for his standing to seek revocation of the licenses: first, that he has had "extensive opportunity to study and investigate" the antitrust and concentration problems involved; second, that he is a shareholder in each of the conglomerate owners of the stations; third, that "but for" the tremendous oligopolistic profits made by these three stations, he would

receive "significantly modified" programming from the networks. I will not consider the validity of these three allegations, because I feel that a grant of standing is justified on the fourth basis, which encompasses the other three.

Petitioner asserts, fourth, that he has standing to bring this case because of an 'independent 'public interest' standing which exists regardless of petitioner's residence, location or relationship to the licensee." It is his contention that because all licensees operate as a public "trustee" for the American people, any alleged violation of the public interest by a licensee may be raised in a petition by an individual member of that public--by a "beneficiary" of that public trust. Petitioner therefore has standing in this action, both as an ombudsman representing the public in general--and thus reminiscent of the federal courts' "private attorneys general" who are given standing to represent the public interest, see Associated Industries v. Ickes, 134 F. 2d 694, 704(2d Cir.), rev'd per curiam on other grounds, 320 U. S. 703 (1943)--and as one of many individual members of the public who, collectively, are the beneficiaries of the broadcaster's public trust.

In recent years the federal courts have eased the strictness of the standing requirement whenever the conditions of adversity and ripeness were reasonably met. See Flast v. Cohen, 392 U. S. 83,

99-100 (1968); Griswold v. Connecticut, 381 U. S. 479 (1965); Baker v. Carr, 369 U. S. 186, 204 (1962). The Supreme Court has said that all that is needed for a party to have standing is "a personal stake in the outcome of the controversy." Baker v. Carr, 369 U. S. 186, 204. Similarly, to ensure that the case is presented in a concrete manner so that both sides are adequately presented to the court, the parties must have "adverse legal interests." Aetna Life Insurance Co. v. Haworth, 300 U. S. 227, 240 (1937). Certainly the petitioner in this case has a sufficient interest in the outcome of the case to be an effective spokesman for the public interest, for his "personal stake" in the quality of television service available to him is exactly the same as that of any television viewer. And there can be little doubt that he is in an adverse position to the three networks. I do not see how this Commission can, at the same time, regulate broadcasting in this country by a "public interest" standard, and yet not listen to the arguments seriously advanced by individual members of that "public."

It is important to note that the policies underlying the doctrines of standing to participate in broadcast renewal proceedings before this Commission differ importantly from the standing doctrines normally applied by the courts. In civil proceedings, for example, a court may wish to spare a defendant the burden of defending himself where the

trial might otherwise be completely avoided--that is, where the plaintiff lacks the involvement required for "standing." In FCC license renewal proceedings, however, an examination of the licensee's past record and future proposals can never be avoided--for this Commission is required by statute to conduct an examination of the licensee's qualifications every three years, whether intervening members of the public participate or not. For this reason the question before the FCC is not, "Will there or will there not be an examination of the licensee's qualifications?" but rather, "Will individual members of the public be allowed to contribute their views on the licensee's qualifications in a proceeding which must be conducted in any case?" The question is not whether the licensee will be spared the "burden" of defending his prior three-year record, but whether in the process of making that defense he will be required to respond to public-interest arguments which the FCC should be raising, but which are often more easily raised by members of the public.

For this Commission to deny standing to the petitioner is to retreat into the realm of legalisms and foresake its duty to serve the public interest. In Barrows v. Jackson, 346 U. S. 249, 257 (1953), the Court said: Standing, "which is only a rule of practice," is "outweighed by the need to protect the fundamental rights which would

be denied by [not allowing the action to be brought]." Even to the Supreme Court, standing is not a doctrine that must be enforced regardless of the public interest in the merits of the case. In Barrows, as here, the petitioner may well have been the only effective advocate of the position being espoused. If the case is dismissed on a procedural technicality, then a crucial issue of public policy might never be advanced. Furthermore, it is both logical and consistent with precedent for a party, willing to argue the public interest, to be granted standing as a representative of the public. Professor Louis Jaffe has written that in Associated Industries v. Ickes, 134 F. 2d 694 (2d Cir.), rev'd per curiam on other grounds, 320 U. S. 703 (1943), Judge Frank argued that a consumer had standing as a "member of a class which is coterminous with the entire human population." Jaffe, Standing to Secure Judicial Review: Public Actions, 74 Harv. L. Rev. 1265, 1314 (1961).

Decisions directed at the FCC have similarly liberalized the doctrine of standing. Early cases gave competing private litigants standing as representatives of the public interest, see Scripps-Howard Radio, Inc. v. FCC, 316 U. S. 4, 14 (1942); FCC v. Sanders Brothers Radio Station, 309 U. S. 470 (1940), and recent decisions have emphasized that this right exists for individual consumers of broadcasting's product. See Hale v. FCC, Case No. 22751 (D. C. Cir., May 15, 1969); Joseph v. FCC, 404 F. 2d 207 (D. C. Cir. 1968).

But certainly the most significant court decision on the subject of FCC standing was Office of Communication of United Church of Christ v. FCC, 359 F. 2d 994 (D. C. Cir. 1966). Judge Burger, writing for a unanimous court, reviewed briefly the history of standing before the Commission. Prior to his decision, only two categories of complainants had standing to be heard before the FCC--those alleging electrical interference and those alleging some economic injury. He noted that ". . . the Commission's traditionally narrow view of standing initially led it to deny standing to the very categories it now asserts are the only ones entitled thereto." Id. at 1000. This history of unsuccessful Commission attempts at excluding anyone other than the immediate parties and the Commission staff showed Judge Burger "that neither administrative nor judicial concepts of standing have been static." Id. He said that the courts have always resolved questions of standing as they arose and never intended to limit the categories of parties with standing to any set number. Logically, when the court broadened standing to include individual members of the listening public, it could not have meant thereby to freeze the doctrine and limit standing to any definite number of categories.

Standing must be thought of as a practical and functional concept to be applied for particular purposes--to regulate the flow

of cases to the Commission and to ensure sufficient timeliness and adversity to make the case suitable for decision. At present, the Commission treats the doctrine as one to be applied rotely whenever anyone outside of the existing mechanical categories asks to be heard. I have had sufficient administrative experience to be as mindful as my colleagues of the potential impact upon this Commission of a "flood" of citizen protests. But I believe that there will be time enough to address such a change in circumstances when and if it arises. In the meantime, I believe we should make every effort not to--or appear to--be unduly restrictive in our interpretation of the "standing" requirements of this agency.

I can only conclude that this Commission is not listening to either the words of the federal courts, or the trend of their decisions, in the area of standing. We do not enforce ownership, programming or engineering standards with much vigor. Recently, this Commission made clear it is not going to hold its licensees to minimal standards of business ethics either. Star Stations of Indiana, Inc. (WIFE-AM-FM), FCC 69-992. If we are to judge licensees' performance or non-performance in the public interest at all, as the law charges us to do, it is simply essential that the public be allowed to communicate with us. Judge Burger in United Church of Christ wrote:

> The theory that the Commission can always effectively represent the listener interests in a renewal proceeding without the aid and participation of legitimate listener representatives fulfilling the role of private attorneys general is one of those assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear, as it does to us now, that it is no longer a valid assumption which stands up under the realities of actual experience, neither we nor the Commission can continue to rely on it. The gradual expansion and evolution of concepts of standing in administrative law attests that experience rather than logic or fixed rules has been accepted as the guide. (Id. at 1003-04.)

Whether it be as "private attorneys general," or in "ombudsman status," or in one's own right, each member of the American public should be allowed to question the performance of their broadcast licensees. When the performance of the giant networks is challenged by a member of the public, especially one experienced and well-versed in the problems he alleges, it is the Commission's statutory duty to hear his charges, rather than hide behind the formal doctrine of standing.

Hearing. Under Section 309(e) of the Communications Act, the Commission must order a hearing on a renewal application when "a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding" that the public interest, convenience, and necessity will be served by renewing the license. In addition, the Court of Appeals for the District ofColumbia has said: "It is fundamentally abhorrent to our system of jurisprudence to deny a hearing to a litigant where justice and law require that a hearing be

held." National Broadcasting Co. v. FCC, 362 F. 2d 946 (D. C. Cir. 1966). Yet in this case the Commission concludes that even if petitioner had standing he has produced nothing to justify a hearing. Given the standards of Section 309(e) and the language of the National Broadcasting Co. case, one would assume that the Commission's denial of petitioner's requests without a hearing meant the Commission was confronted with clear issues totally devoid of any relevant problems. But that was not the case.

The majority of the Commission concludes:

- "The petitioner has nowhere set forth facts that show the networks to be in violation of any law, Commission policy or rule."

- "The petitioner has not made any showing as to how the grant of these renewals would be prima facie inconsistent with the public interest, convenience and necessity."

- "[N]o . . . showing of serious questions is made here; rather there is an absence of any specific showing of abuse, law violation or discernible overriding public interest concern."

In their opinion the majority does not correctly summarize the petitioner's allegations; it does not answer the substantial issues raised by the petitions; and contrary to law and precedent it refuses to set the issues for hearing so that the questions can be resolved.

The majority has said that petitioner has not "set forth facts" showing a

"violation of any law." But to the contrary, in the petition against CBS, for example, petitioner states:

> WCBS-TV ownership by CBS stands as an egregious example of a major corporate licensee operating in violation of anti-trust requirements, both as regards to a lessening of competition in an industry (i. e., the television broadcasting and networking industry) and as regards to actual economic power being used and tending to create a monopoly-oligopoly. In essence, all three national networks are operating in violation of, inter alia, the Act of July 2, 1890, and the Act of October 14, 1914, (15 U. S. C. A. § 1, 15) and all acts amendatory thereto, commonly known as the Sherman and Clayton Acts.
>
> CBS owns five major market VHF television stations with an estimated audience reach of 38 million persons, or roughly 19% of the total population of the United States. . . . Court decisions have held that far less concentration than 19% of an industry is sufficient to constitute a restraint against trade when the industry as a whole is made up of small producers (which a television station is). Clearly, CBS, controlling access to 19% of the nation's television audience through its O&O's, with almost 50% of this total coming from WCBS-TV constitutes a major monopolistic-oligopolistic factor in the television broadcasting industry.
>
> * * *
>
> . . . CBS not only owns television stations and operates a national television network, it also produces television programs, syndicates reruns, and is entering the motion picture production business (see Broadcasting, April 14, 1969, p. 56). CBS also owns the New York Yankees, the publishing house of Holt, Rinehart & Winston, and the Columbia records division. Not only are such varied and diverse interests funded by television monopoly-oligopoly profits, it is a classic example of accretion leading to widening violation of anti-trust considerations (networking, station ownership, sports and publishing expansion, motion picture production for the captive CBS network, etc.)

There is no more contradictory nor scandulous concentration of economic power and activities that CBS could be engaged in, when weighed against its public service requirements and free market competition in the entertainment industry. As a matter of long-standing precedent, ownership of motion picture production and exhibition facilities (i. e. in the case of CBS, exhibition on the CBS television network) has been incompatible with anti-trust policy interests (q. v. U. S. v. Paramount Pictures, 334 U. S. 131, 68 S. Ct. 915 [1948]). When the anti-trust implications of motion picture production and exhibition are coupled with a similar stranglehold on television production and exhibition over the captive CBS television network, the gross and far ranging boundries of the monopoly implications are perceived.

In addition, ownership of WCBS-TV by a parent corporation which also operates a national radio network is also contrary to the public interest and anti-trust requirements. Ownership of competitive media networks by the same company, in addition to its own competitive media license holdings, tends to produce conditions which effectively restrict competition from potential competitors.

* * *

CBS is obviously not a monopoly in the strict sense of the word, since it has two competitors; but to the extent it engages in monopoly practices (ownership of stations and networks, and punative motion picture production, and diversification in New York Yankees, Holt and other activities) CBS represents a monopoly grafted on an oligopoly.

The majority also states that there is no showing that the renewal grant of these licensees would be "inconsistent with the public interest." The Communications Act does not require that an absolute "showing" be made in a petition; rather the mere presentation of

"a substantial and material question of fact" necessitates a hearing. Petitioner has certainly met this minimum requirement. As an example, in the CBS petition, he says:

> CBS owns three full-time maximum-power licenses in New York City. All three licenses are palpably used to enhance the profit potential of network operations and are operated in the best interests of the CBS corporate structure, not the public interest. Together with its competitor networks, the group owns 9 full-time maximum power licenses in New York City. Ownership of the three full-time stations in New York inhibits growth and development not only of local program service and local license ownership, but also of competitive network service. It would be almost impossible for a new competitor to overcome the structural advantage of the existing networks with their free public O&O profits to fend off any challenges. Furthermore, ownership of "flagship" stations for both television and radio inhibits the joint and several development of both media. Not only does CBS control the existing network apparatus for both television and radio (and in the case of radio, record production and distribution facilities as well), but CBS controls the most desirable market licenses, creating a situation which is calculated to dissuade new competition in such a monopolistically structured industry. The structure and dissuasion come not because of any corporate acumen, but because of licenses furnished free to CBS by the public.
>
> Nationally, CBS owns 19 full-time stations, including AM-FM-TV stations in the nation's top three markets. Looked at in conjunction with ownership of competing networks, this concentration of media power tends to further discourage competition and in fact, because of structural limitations in the spectrum, to "lock in" the existing national networks in perpetuity. The Commission is already aware of the coercive effects of undue market power in proposing its longstanding "50-50" rule making.

> Clearly, CBS fails to sustain any convincing burden of proof of operating WCBS-TV in the overall public interest both as to concentration of media power and ownership of competitive media. Nationally, CBS controls 19 major market licenses and has affiliation agreements with hundreds of stations. WCBS-TV and the other O&O's provide a protective profit penumbra behind which the CBS corporate complex has increased its power and expanded the scope of its activities in areas totally unrelated to broadcasting. The public interest would be better served both locally and nationally, if the current network-owned stations in New York were "freed" and allowed to choose affiliation or programming service independently of parent corporation network policy.

In its most sweeping statement, the majority finds "no serious questions" and nothing of "overriding public interest concern" in the three petitions. Again from the CBS petition:

> Derivative from and associated with CBS's antitrust and public policy violations and concentration of media power are the very real problems posed by internal conflicts in the CBS organization. CBS is an obvious entertainment and related activity conglomerate which has used television-radio profits to expand in numerous directions.
>
> What is more significant, and more difficult to discern on first sight, is the great conflict between being a national news and programming source, and being a secret defense contractor at the same time. CBS must "censor" its news if it is to please its Department of Defense customer; significant, and a particularly good instance thereof, is the case of the CBS Laboratories laser cameras used in Viet-Nam. It is virtually impossible for a company which derives financial sustenance from the war, and which also relies on government cooperation for prime licenses, not to be swayed by the countervailing (to the public interest) pressures of the military-industrial complex. It is impossible for CBS

to air local or network editorials in opposition to the Viet-Nam War, or make other observations on the folly of a massive military-industrial establishment to placate defense contractors, when CBS itself is one of those contractors. A company which is developing and providing defense products for the government cannot render an impartial view on government policies which involve the nation in distant wars and domestic dissension. CBS can of course make pro-forma editorial and news presentations, but it cannot make a genuine contribution to unbiased and meaningful national debate when it has a division serving the needs of the military-industrial complex and which is actively supporting government policy and spy surveillance in Viet-Nam (for a discussion of the laser camera, finally unveiled by CBS after approval by the Department of Defense, see Broadcasting, April 7, 1969, p. 49).

In deciding to grant a license renewal to WCBS-TV, the crucial issue is not whether CBS may have operated the station in compliance with minimum public service requirements, in effect providing mechanical pro forma data on renewal applications, but rather an examination of what the competitive and countervailing advantages accruing to the public both locally and nationally would be from a locally owned New York station which was not the captive of a national network or group broadcaster. It is more than a remote possibility that a "free" New York channel could develop into a significant national voice and provide national syndication of programs all on its own.

It is clear that under the existing corporate structure of CBS, management has its hands full overseeing activities from baseball to book publishing, in addition to station and network ownership and management, and now movie production, as well as secret defense contracting, manufacturing and record production, and that CBS as a corporate entity is unable to devote full and substantial attention to the major function and responsibility of a broadcast licensee: serving the public interest in the direct operation of the station license.

Not only does the corporate conglomerate status of CBS affect entry into the broadcasting industry, but in publishing, sports and now movie production as well. The guaranteed (almost) profit potential of a New York VHF license is not being used to serve the necessity and convenience of the American public; it is being used to finance CBS corporate conglomerate venture which are in most instances totally unrelated or incompatible with the public interest requirements of a licensee. Clearly, as in the case of one-bank holding companies having other business interests, it is evident that essentially public service corporations with the inherent protections of legally restricted market entry and technical limitations (in the case of radio and television) should not be allowed to speculate in unrelated and incompatible acticities which do not serve the genuine and direct public interest of the station license itself.

If in all of these three lengthy petitions--raising antitrust, concentration, and conglomerate issues, the majority can find "no serious questions," then I have little hope that these important issues will ever be addressed by this Commission. The allegations I have quoted, and comparable ones from the other two petitions, raise substantial questions as to these licensees' performance in the public interest. I do not believe that this Commission has the legal authority summarily to dismiss such petitions without a hearing on their merits.

I dissent.

BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,601

ANTHONY R. MARTIN-TRIGONA,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

AMERICAN BROADCASTING COMPANIES, INC.,
COLUMBIA BROADCASTING SYSTEM, INC.,
NATIONAL BROADCASTING COMPANY, INC.,
Intervenors.

ON APPEAL FROM A MEMORANDUM OPINION AND ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

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IN THE UNITED STATES COURT OF APPEALS
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AMERICAN BROADCASTING COMPANIES, INC.,
COLUMBIA BROADCASTING SYSTEM, INC.,
NATIONAL BROADCASTING COMPANY, INC.,
Intervenors.

ON APPEAL FROM A MEMORANDUM OPINION AND ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION *

BRIEF FOR APPELLEE

QUESTIONS PRESENTED **

1. Whether the Commission erred in its determination that appellant lacked standing as a party in interest within the meaning of Section 309(d) of the Communications Act to file petitions to deny the license renewal applications of three television stations located in New York City.

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*/ By Order of the Court, dated March 13, 1970, this proceeding, originally brought as a petition for review under Section 402(a) of the Communications Act, has been modified to an appeal pursuant to Section 402(b) of the Act.

**/ This case has not previously been before this Court.

2. Whether the Commission erred in its determination that appellant had presented no "substantial and material questions of fact" requiring a hearing on these renewal applications.

STATEMENT OF THE CASE

On May 28, 1969, the appellant, Anthony R. Martin-Trigona, filed three substantially identical petitions with the Commission (A. 1-46) seeking to revoke the broadcast licenses of WNBC-TV, WCBS-TV and WABC-TV, licensed respectively to the National Broadcasting Company, Inc.; the Columbia Broadcasting System, Inc.; and the American Broadcasting Company, Inc. For the purpose of establishing his standing to challenge the licenses, 1/ Martin-Trigona identified himself as a citizen of the United States and a resident of Urbana, Illinois, who "has had extensive opportunity to study and investigate the anti-trust, conglomerate and concentration of media violations posed by the ownership" of these stations. He also indicated that he was a viewer of network programs, and that "regardless of . . . residence, location or relationship to the licensee" he claimed "independent 'public interest' standing"

1/ Section 309(d)(1) of the Communications Act, 47 U.S.C. 309(d)(1), requires that an appellant must set forth "specific allegations of fact sufficient to show that [he] is a party in interest."

to be heard on the renewal applications of the New York stations (A. 2-4, 18-20, 33-35).

Three issues were set forth which Martin-Trigona alleged compelled a hearing on the renewal applications of the licenses involved: (1) "the existing anti-trust violations posed by ownership" of these stations, (2) "the concentration of media problems, violations and restraints" posed by their ownership, and (3) "conglomerate and conflict of interest problems and violations." The performance of the stations was not questioned. However, the appellant stated that if the Commission should rule that their entire broadcast records should be considered at any designated hearing, he reserved the right to supplement his petition to provide additional information concerning each licensee's failure to present programming responsive to the needs of racial minority groups, failure to program in areas of public importance where "the interests of advertisers, or its own corporate conglomerate interests might be adversely affected;" unimaginative, uninteresting, unentertaining (and in the case of CBS) "geriatric" programming; misleading programming practices and (in the case of CBS) "objectional censorship of performers such as the Smother's Brothers Comedy Hour which detract and vitiate from any social commentary;" excessive commercials; failure to fulfill

its obligations under the fairness doctrine with respect to controversial issues of public importance; and excessive use of movies in prime-time (A. 4-13, 20-29, 35-44).

NBC, CBS and ABC filed responses in which they asserted on various grounds that the allegations did not warrant an evidentiary hearing (A. 47, 49, 51). In addition, each of the licensees had already submitted as part of its renewal application an extensive showing as to the performance of the station during the preceding license period and a statement of proposed program service (FCC File Nos. BRCT-1, BRCT-3, BRCT-221); so that when it acted the Commission had before it this documentation as well as Martin-Trigona's complaint and the pleadings related to it.

By Memorandum Opinion and Order released October 13, 1969 (A. 63-81), the Commission dismissed the petitions, finding that Martin-Trigona had not demonstrated standing as a party in interest.[2/] First of all it pointed out that Martin-Trigona was not (and did not allege to be) a viewer of the stations whose renewal applications he sought to contest:

2/ Commissioner Cox concurred in the result. Commissioner Johnson dissented, issuing a statement in which he concluded that Martin-Trigona was a party in interest and had advanced sufficient grounds to justify a hearing on the applications for renewal.

"The stations which he views are Illinois stations, not these New York stations. Of course, these Illinois stations present network programming, but they remain fully responsible for all programming presented. For example, fairness questions or questions of excessive commercialization remain the full responsibility of the individual licensee. To the extent that petitioner bases his standing on challenges concerning the programming he has been receiving, such challenges should be directed to the stations from which he is receiving service." (A. 65). As to the contention that "but for" their ownership of these stations, the television networks would provide different service the Commission concluded that "petitioner has not met the burden imposed upon him by Section 309(d), of showing that a grant or denial of license renewals to these three New York stations would affect the programming viewed by him; that he has simply made a bare allegation in this respect. Elimination of all networking would of course affect the programming received by petitioner, but here again there is no showing that such a drastic occurrence would benefit petitioner or the millions of viewers of network television." (Id.) And finally, the Commission noted that Martin-Trigona's status as a shareholder in the licensee corporations hardly rendered him a person aggrieved by renewal of the licenses. (Id.)

However, in view of its policy of welcoming and examining complaints from the listening public, the Commission considered the petition on its merits, but found that it failed to demonstrate a grant of the applications would be contrary to the public interest (A. 66-67):

> The petitioner has nowhere set forth facts that show the networks to be in violation of any law, Commission policy or rule. Ownership of the New York stations is consistent with our rules and our policy, and indeed flagship stations may be necessary to networking, which in turn provides great public benefits. [Footnote ommitted.] For the most part, petitioner's pleadings recite conclusions, not factual allegations. They are replete with pejorative language, highly individual opinions and unsupported and unsubstantiated accusations. The petitioner has not made any showing as to how the grant of these renewals would be prima facie inconsistent with the public interest, convenience and necessity. On the broadcast policy questions of multiple ownership and conglomerate control of licensees, the Commission has issued public notices and instituted rule making proceedings, and is thus exploring the general issues in this important area. This does not mean that we should, or would, ignore serious questions raised in individual proceedings, and, as shown by recent actions, we have not done so. But no such showing of serious questions is made here; rather there is an absence of any specific showing of abuse, law violation or discernible overriding public interest concern. [Footnote omitted.]

With regard to appellant's programming criticisms (one of the areas concerning which he reserved the right to supplement his petition should the Commission so desire), the Commission stated that the selection and presentation of programming material is essentially a matter within the sound discretion of the individual licensee: "It is not our function

to make artistic value judgments as to the worth or demerits of a given entertainment program. We cannot properly deal with the blanket charge that network programming is 'unimaginative', 'unentertaining' or 'geriatric.'" Similarly, the Commission found the fairness doctrine question raised by appellant to be "not litigable" since the fairness doctrine deals with specific controversial issues of public importance, "not vague or formless generalities." (A. 67-68).

Martin-Trigona seeks review of this Memorandum Opinion and Order.

ARGUMENT

I. THE COMMISSION PROPERLY FOUND THAT APPELLANT DID NOT HAVE STANDING UNDER THE COMMUNICATIONS ACT.

This Court has held that in broadcast license proceedings under the Communications Act "the concept of standing is a practical and functional one designed to insure that only those with a genuine and legitimate interest can participate. . . ." Office of Communication of the United Church of Christ v. F.C.C., 123 U.S. App. D.C. 328, 336, 359 F.2d 994, 1002 (1966). The determination of what "genuine and legitimate" interests represent standing in "each case turns on the nature of the parties, the grievances and the statutory provisions involved." Curran v. Laird, Case No. 21,040 D.C. Cir., decided

November 12, 1969, Slip Op. p. 6; see Assn. of Data Processing Services Organization, Inc. v. Camp, 38 U.S.L.W. 4193.

The Communications Act has been construed as conferring standing on a fairly broad range of interests, including those alleging economic injury, F.C.C. v. Sanders Bros. Radio Station, 309 U.S. 470 (1940); those alleging electrical interference F.C.C. v. N.B.C. (KOA), 319 U.S. 239 (1943); and more recently on "responsible spokesmen for representative groups having significant roots in the listening community," Office of Communication of the United Church of Christ v. F.C.C., 123 U.S. App. D.C. 328, 339 ; 359 F.2d 994, 1005.[3/] It has been recognized, however, that even within these generally recognized categories the concept of standing is not an unlimited one. Section 309(d) of the Act provides that "specific allegations of fact" sufficient to demonstrate interest must be made. And this Court has upheld the Commission's refusal to grant standing where claims of economic injury or electrical interference were deemed insufficient to give rise to a real and substantial interest. Interstate Broadcasting Co. v. F.C.C., 108 U.S. App. D.C. 78, 280 F.2d 626 (1960); N.B.C. v. F.C.C., 124 U.S. App. D.C. 116, 127, 362 F.2d 946, 957 (1966). Similarly

3/ Recent decisions of this Court have enlarged the bases for standing in other areas. See e.g. Curran v. Laird, supra; Scanwell Laboratories, Inc. v. Thomas, Case No. 22,863 decided February 13, 1970. In essence these cases recognize that aggrievement in fact, for many years a test of standing under the Communications Act (F.C.C. v. Sanders Bros. Radio Station, supra), is a concept which may properly be applied elsewhere as well.

in United Church of Christ the Court recognized that interests not genuinely representative of the listening public could be excluded and that the Commission "should be accorded broad discretion" in establishing standards, 123 U.S. App. D.C. at 339, 359 F.2d at 1005.

As it stated in the order now under review the Commission is receptive to petitions from listeners dealing with the performance of broadcast stations, and its decisions show that it does not seek to erect artifical barriers based on standing to avoid an examination of the merits of these complaints. See Television Station WCBS-TV, 8 F.C.C. 2d 381, recon. denied 9 F.C.C. 2d 921 (1967), affirmed Banzhaf v. F.C.C., 132 U.S. App. D.C. 14, 405 F.2d 1082 (1968), cert. denied sub nom. Tobacco Institute v. F.C.C., 396 U.S. 842 (1969); KSL, Inc., 16 F.C.C. 2d 340, affirmed Hale and Wharton v. F.C.C., Case No. 22,751, D. C. Cir., decided February 16, 1970; Glenkaren Associates, Inc., 19 F.C.C. 2d 13 (1969), appeal pending sub nom. Citizens Committee to Preserve the Present Programming of the "Voice of the Arts in Atlanta on WGKA-AM and FM" v. F.C.C., Case No. 23,515, D.C.Cir.; Brandywine-Main Line Radio, Inc., 9 Pike & Fischer, R.R. 2d 126 (1967). While

the subject matter of these cases varied considerably, in each instance the complaining party asserted an interest based on his status as a resident of the station's service area and a member of its actual or potential audience; in no case did the Commission hold that standing had not been shown. In the present case Martin Trigona neither demonstrated nor alleged such status and failed to establish any other nexus between his own situation and the licensing of the New York stations sufficiently strong to give rise to a genuine and legitimate interest. Like Interstate and N.B.C., supra, this is a case in which the Commission could properly find that the appellant was not a "person aggrieved" or "party in interest" within the meaning of the Communications Act.[4/]

Martin-Trigona's claim of "interest" in the renewal of the New York licenses stems from: (1) his ownership of stock in the parent corporations that own these stations and hold the licenses being renewed; (2) "his specialized study" of NBC, CBS, and ABC corporate affairs; (3) his viewing of the NBC, CBS, and ABC network

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4/ It is settled law that the interests which confer standing to petition as a "party in interest" to deny any application for renewal, 47 U.S.C. 309, are identical with those which confer standing as a "person aggrieved" to appeal from a Commission order under Section 402(b) of the Act, 47 U.S.C. 402(b). Camden Radio, Inc. v. F.C.C., 94 U.S. App. D.C. 312, 316, 220 F.2d 191, 194; Metropolitan Television Co. v. F.C.C., 95 U.S. App. D.C. 326, 327, 221 F.2d 879, 880 (1955). The terms have thus been regarded by the Court as interchangeable.

programs through the facilities of other stations located in Illinois where he lives, and (4) his status as a spokesman for the public interest (i.e., an "ombudsman," A. 19).

As to the first of these, his position as a stockholder in the licensee corporations, Martin-Trigona did not develop the point at all but simply noted his "shareholder status" (A. 18). The Commission found it difficult to see how renewal of the licenses would render him a person aggrieved in this regard. In the absence of any showing to the contrary it would seem reasonable to suppose that this interest is advanced rather than injured by renewal of the licenses since admittedly the facilities are profitable. Likewise his alleged but undocumented "specialized knowledge" hardly demonstrates the "palpable injury" required to establish standing. Cf. Scanwell Laboratories, Inc. v. Thomas, supra, slip opinion, pp. 22-24.

To support the contention that his status as a viewer of television confers standing to contest the renewal of these licenses, appellant relies largely on this Court's decision in United Church of Christ, supra. That decision does not, in the circumstances of this proceeding, provide authority for such a claim. There the grounds relied on for standing, as

set forth in the Court's opinion,[5] establish a direct connection between the station whose license was being contested and the complaining parties, representatives of a substantial segment of the audience whose needs and interests the station was licensed to serve. Public participation in the licensing process was warranted, the Court stated, because it is "essential" that "the holders of broadcast licenses be responsive to the needs of the audience" (123 U.S. App. D.C. at 336, 359 F.2d at 1002), is viewers, who "will have been exposed for at least three years to the licensee's performance" (123 U.S. App. D.C. at 338, 359 F.2d at 1004), and may be the only ones with a genuine

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5/ The opinion states (123 U.S. App. D.C. at 332; 359 F.2d at 998):

> Appellants claim standing before the Commission on the grounds that:
>
> (1) They are individuals and organizations who were denied the right to have equal time to answer their critics, a violation of the Fairness Doctrine.
>
> (2) These individuals and organizations represent the nearly one half of WLBT's potential listening audience who were denied an opportunity to have their side of controversial issues presented, equally a violation of the Fairness Doctrine, and who were more generally ignored and discriminated against in WLBT's programs.
>
> (3) These individuals and organizations represent the total audience, not merely one part of it, and they assert the right of all listeners, regardless of race or religion, to hear and see balanced programming on significant public questions as required by the Fairness Doctrine and also their broad interst that the station be operated in the public interest in all respects. (Footnote omitted.)

interest in bringing programming deficiencies to the attention of the Commission. Thus the thrust of the opinion was to establish the right of "responsible spokesmen" with "significant roots in the listening community" to be heard in connection with the licensing of broadcast stations in that community.

Martin-Trigona asserts no such status. As a resident of Illinois he is neither a viewer nor a representative spokesman of those who reside in the service areas of the New York stations. And he makes no serious contention that the programming of these stations is not responsive to the needs of the area they serve or that their operation has not complied with the rules and licensing policies of the Commission. United Church of Christ thus does not aid appellant's contention; indeed its underlying rationale is consistent with the Commission's view that the absence of any ties between Martin-Trigona and the community served by the New York stations militates against his claim to standing.

To overcome this difficulty appellant asserts that he views network programs which are carried over local Illinois stations, and "but for" the revenue which the networks derive from their New York stations this programming would be different.

The Commission is well aware that many of the programs offered over local stations are not produced locally. This is so not only of network programs but of film and syndicated material the stations acquire from non-network sources. But the responsibility once a decision is made to air this material rests with the licensee.[6/] As the Commission stated in its Report and Statement of Policy Re: Commission en banc Programming Inquiry, 20 Pike & Fischer, R.R. 1901, 1910-11: "The foundation of the American system of broadcasting was laid in the Radio Act of 1927 when Congress placed the basic responsibility for all matter broadcast to the public at the grass roots level in the hands of the station licensee. That obligation was carried forward into the Communications Act of 1934, and remains unaltered and undivided. The licensee, is, in effect, a trustee in the sense that his license to operate his station imposes upon him a non-delegable duty to serve the public interest in the community

6/ See e.g., Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969); and Anti-Defamation League of B'nai B'rith v. F.C.C., ___ U.S. App. D.C. ___, 403 F.2d 169 (1968), cert. denied 394 U.S. 930 (1969). The program material involved in each of these cases was supplied to the stations by outside sources but in each instance the licensee was held responsible for satisfying complaints validly made under the Fairness Doctrine.

he had chosen to represent as a broadcaster."[7/]

As to the "but for" argument, this plainly represents too remote an interest to satisfy the requirements of standing.[8/] But aside from this, how cutting off the networks from the revenues derived from their New York stations would rectify "program deficiencies"[9/] or improve the quality of service in New York City or Champaign-Urbana, Illinois, is nowhere explained. To assert simply that service would be "significantly modified" (A. 2, 18, 33) is, in the sense of showing aggrievement from a grant of the licenses, to assert nothing at all. Manifestly, the Commission could properly conclude that Martin-Trigona

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7/ See also Section 73.658(e) of the Rules, 47 CFR 73.658(e):

> Right to reject programs. No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which, with respect to programs offered or already contracted for pursuant to an affiliation contract, prevents or hinders the station from (1) rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable or contrary to the public interest, or (2) substituting a program which, in the station's opinion, is of greater local or national importance.

8/ See Southwestern Publishing Co. v. F.C.C., 100 U.S. App. D.C. 251, 243 F.2d 829 (1957), where the Court held that the interest of a corporate subsidiary in a Commission proceeding could not be asserted by the parent company since as to the latter the interest was derivative in nature rather than direct.

9/ United Church of Christ, supra.

"has not met the burden imposed upon him by Section 309(d), of showing that a grant or denial of license renewals to these three New York stations would affect the programming viewed by him. . . .;" that "he has simply made a bare allegation in this respect;" and that while "elimination of all networking would of course affect the programming received by [Martin-Trigona] . . . there is no showing that such a drastic occurrence would benefit [him] or the millions of viewers of network television" (A. 65).

Finally, the argument is made that the Commission erred in not regarding the appellant as an "ombudsman" (A. 3, 19, 34, Br. pp. 7-10) with the right to represent the public interest in these proceedings. But considering the number of people and groups within the service area of these stations who could claim standing under United Church of Christ and the number of competing interests eligible under Philco Corp. v. F.C.C., 103 U.S. App. D.C. 278, 259 F.2d 656 (1958), cert. denied 358 U.S. 946 (1959), there is no lack of eligible spokesmen with "direct and substantial personal interest in the outcome."[10/] Appellant's argument is in essence that the right to be heard is co-extensive with the desire to be heard, a notion that would for

10/ City of Chicago v. A.T. & S.F. R. Co., 357 U.S. 77, 83 (1958).

purposes eliminate the concept of standing and render meaningless the thoughtful analysis of the issue which this Court (in Curran and Scanwell, supra) and the Supreme Court (in Data Processing Services, supra, and Barlow v. Collins, 38 U.S.L.W. 4193) have recently made.

This is not to say that Martin-Trigona or any other citizen is foreclosed from placing before the Commission his views with respect to the structure of the broadcast industry.[11/] The Commission has been for some time engaged in studies bearing on the matters touched on in the petitions appellant filed with the Commission and has sought public comment on them. As we show in the following section of our brief, this is one fact which justified the Commission's refusal to hold license renewal hearings on the issues raised by Martin-Trigona. But in addition it refutes the assumption underlying appellant's plea for ombudsman status, that there is just no other way for individuals to place their views on these questions before the regulatory agency.

11/ From the substance of his complaints it is evident that Martin-Trigona's interest in the operation of the licenses for WABC-TV, WNBC-TV, and WCBS-TV is negligible; he argues in effect that renewal proceedings should be used as a vehicle for investigating the practices of the parent corporation's television networks. His allegations center on alleged anti-trust violations, conglomerate conflict of interests and undue concentration of media power in New York City and in the national market. See Point II, infra.

II. THE COMMISSION CORRECTLY CONCLUDED THAT MARTIN-TRIGONA'S ALLEGATIONS DID NOT WARRANT A HEARING ON THE APPLICATIONS FOR RENEWAL OF LICENSE.

Section 309(d) of the Communications Act, 47 U.S.C. 309(d), provides that broadcast applications may be granted without hearing where the Commission finds, after consideration of the application and all relevant pleadings, that there are no substantial and material questions of fact outstanding and that a grant is in the public interest. The statute provides that where a petition to deny is filed, it must "contain specific allegations of fact sufficient to show . . . that a grant of the application would be prima facie inconsistent with" the public interest. 47 U.S.C. 309(d)(1). Where the Commission finds that this showing has not been made, the petition to deny may be disposed of by a concise statement of the reasons for denial.

In amending the statute in 1960, Congress intended that petitions to deny filed under the new Section 309(d) should make "a substantially stronger showing of greater probative value than [was then] necessary in the case of a post grant protest. The allegation of ultimate, conclusionary facts or mere general allegations on information and belief, supported by general affidavits, as [was then]

possible . . . [is no longer] sufficient." S. Rept. No. 690, 86th Cong., 1st Sess., p. 3 (1959).[12/]

Thus, Section 309(d), both by its terms and in light of its legislative history, reflects the intent of Congress that a hearing not be required in the absence of substantial factual allegations which, if true, establish a prima facie case for denial. But where material facts are not in dispute and any legal or policy questions are resolved in favor of the applicant, no hearing is required. Southwestern Operating Co. v. F.C.C., 122 U.S. App. D.C. 137, 351 F.2d 834 (1965); American Federation of Musicians v. F.C.C., 123 U.S. App. D.C. 74, 356 F.2d 827 (1966); Broadcast Enterprises, Inc. v. F.C.C., 129 U.S. App. D.C. 68, 390 F.2d 483 (1968); Hale and Wharton v. F.C.C., Case No. 22,751 D.C. Cir., decided February 16, 1970.

Appellant here failed to establish with any degree of specificity the existence of any substantial or material questions

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12/ The post-grant protest referred to was that provided for in the then Section 309(c), which gave the Commission little discretion. See Federal Broadcasting System, Inc. v. F.C.C., 96 U.S. App. D.C. 260, 263, 225 F.2d 560, 563, cert. denied 350 U.S. 923 (1955), holding that what was required of a protest under Section 309(c) was "merely an articulated statement of some fact or situation which would tend to show, if established at a hearing, that the grant of the license contravened public interest, convenience and necessity, or that the licensee was technically or financially unqualified, contrary to the Commission's initial finding."

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of fact which would have required resolution by way of an evidentiary hearing and has not demonstrated that the Commission abused its discretion in holding that the public interest would be served by the grant of these applications. Martin-Trigona's brief and his complaints to the Commission present somewhat confused and conflicting statements of the relief he seeks. While he requests that the Commission deny the renewal of the licenses of WABC-TV, WNBC-TV, and WCBS-TV, it is difficult to discern precisely why he things this would be in the public interest, or what he would adduce in the way of evidence if a hearing were held. In order to lend some structure to our response, we have assumed that in essence appellant is arguing that the three networks operated by RCA, CBS, and ABC, together with the stations they own, creates a situation which forecloses development of additional network programming. This general allegation was asserted before the Commission in petitions to revoke which appellant divided into three categoies: anti-trust (A. 6, 22, 37), concentration of media (A. 10, 26, 41), and conglomerate interests (A. 11, 27, 42).

The Commission in examining his complaints found at the outset that Martin-Trigona had "no where set forth facts that show the networks to be in violation of any law, Commission

policy or rule." Except for vague and unspecified references to the anti-trust laws, appellant really does not dispute this finding. With regard to the effect of network owned stations on the freedom of entry into the field of networking the Commission concluded that no substantive showing had been made in support of the allegation and that it was at odds with the Commission's own experience (A. 67): ". . . it is not network ownership of stations which blocks development of new networks; after all, there are other multiple owners with stations in the larger markets, and we have stated our willingness to consider waiver of our multiple ownership policies, if we had some assurance that such waiver would result in a fourth network. The main obstacle, as we see it, is the difficulty of entering the field in light of the limited number of presently prized VHF stations in many markets available for affiliation to any new network. (See legislative history of 1962 all-channel law, H. R. 1559, 87th Cong., 2d Sess., pp. 3, 4 (S. Report No. 1526, 87th Cong., 2d Sess., pp. 4, 7.))"

The Commission went on to point out that the general issues of multiple ownership and conglomerate control of licensees was currently being considered in rulemaking proceedings. Since appellant did not allege with specificity

anything which, if true, would warrant denial of these particular licenses,[13/] but only that in a general sense the present corporate structure and pattern of ownership interest was undesirable, it was entirely reasonable to defer judgment on these questions pending the outcome of the broader inquiries already docketed. See Hale and Wharton v. F.C.C., supra; Pikes Peak Broadcasting Co. v. F.C.C., Case No. 22,023, D.C. Cir., decided March 24, 1969, cert. denied 395 U.S. 979, Slip Opinion pp. 15-16; American Commercial Lines v. Louisville and Nashville R. R., 392 U.S. 571 (1968).

In its essential aspects the situation here is closely analogous to that presented in the recent case of Hale and Wharton v. F.C.C., supra. There too the appellant had sought to explore in the context of a renewal hearing broad questions of policy relating to multiple ownership of broadcast stations and

13/ Compare Chronicle Broadcasting Co. (KRON-FM and TV), 16 F.C.C. 2d 882, 17 F.C.C. 2d 245 (1969), and Midwest Radio-Television, Inc. (WCCO-AM and TV), 16 F.C.C. 2d 943, 17 F.C.C. 2d 290 (1969). These cases were designated for hearing primarily because specific factual allegations raised an issue as to whether the licensees had used their positions of control over media to engage in anti-competitive and discriminatory practices. In KRON it was alleged with particularity how this situation was utilized to "manage" the news, and in WCCO the complainant showed how this common control of media was used to work discriminations against the other area broadcast outlets.

nonbroadcast business interests of the licensee. As the Court observed, such allegations amount to a challenge to the wisdom of the Commission's existing multiple ownership rules, a challenge that would require a basic change in policy. The Court agreed with the Commission view here that such proposals are "more effectively and properly carried on" in rulemaking proceedings.[14/]

We do not mean by the foregoing to infer that the issues to which the appellant adverted in his petitions are themselves inconsequential--only that he failed to show that the public interest required their consideration in the context of these license proceedings. The general subject matter is of continuing concern to the Commission. Thus, in 1965 the agency issued a Notice of Proposed Rule Making, Competition and Responsibility in Network Television Broadcasting, 30 F.R. 4065, in which it pointed out that while networks have long been a part of the American system of broadcasting, their existence and contribution should not be at the expense of genuine and healthy

14/ The Court also addressed itself to questions of fairness raised by appellants with regard to KSL's programming and concurred in the Commission's conclusion that violations of the fairness doctrine must be "based on quite specific facts" and went on to conclude that the overall requirements of the Commission with regard to such complaints was "not unreasonable," slip opinion pp. 3-4.

competition. The proposed rule, the Commission stated, was designed to rectify what studies by the Commission's staff had described as "existent competitive imbalances and to encourage and maintain increased competition in television program production and procurement." 30 F.R. at 4066.

Specifically, the Commission proposal would (1) restrict the direct financial and proprietary control exercised by networks over their evening programming in order to open up some prime time on each network for programs controlled by persons other than networks; (2) prohibit networks from engaging in domestic syndication and from distribution in foreign markets of programs which were produced by others; (3) prohibit networks from acquiring syndication and foreign distribution rights in network programs not produced by them and (4) require networks to divest themselves of the present syndication and foreign distribution rights and interests of the types they would be prohibited from acquiring under the new rule.

Comments have been received and oral argument was held last July. At the time of oral argument the parties were also asked to address themselves to a counterproposal of Westinghouse Broadcasting Co. which would prohibit a television station in any

of the top 50 markets in which there are three or more operating television stations from contracting with a network to carry any regularly scheduled network programs more than a total of 3 hours between 7 p.m. and 11 p.m. 33 F.R. 14470, 14471 (1968). These proposals are presently under active consideration by the Commission.[15/]

This proceeding was begun as a result of the Commission's Program Inquiry (Docket 12782) which included an exhaustive and continuing examination of the policies, practices, and operations of various components of the television industry. (The genesis and early phases of this study are described in F.C.C. v. Schreiber, 381 U.S. 279 (1965)). Other actions stemming from this proceeding include the prohibition of "option time" agreements, Option Time, 34 F.C.C. 1103 (1963), and the so-called "National Spot Sales" decision, National Spot Sales Representation, 19 Pike & Fischer, R.R. 1501 (1959), affirmed Metropolitan Television Co. v. F.C.C., 110 U.S. App. D.C. 133, 289 F.2d 874 (1961). Both of these actions were aimed at network practices found to be, either actually or potentially, restraints on competition.

15/ Additionally, the Commission has received comments on a rule which would add an affirmative requirement that the regular affiliate of a network be given a period of 72 hours to exercise its "first refusal" right to a network program offering and if not exercised, the network will offer it to other stations in the community. Television Network Programs Unavailable to Certain Television Stations, 30 F.R. 1066.

Other aspects of competition in broadcasting are also under active consideration in current rulemaking proceedings. In April, 1968, the Commission proposed a rule to amend its multiple ownership regulation so as to prevent common ownership operation or control of more than one unlimited-time broadcast station in a market. Multiple Ownership of Standard, FM and TV Broadcast Stations, 33 F.R. 5315, reconsideration denied 12 F.C.C. 2d 912 (1968). Along with this proceeding to explore the problems dealing with the concentration and diversification of the broadcast media, the Commission initiated a so-called "conglomerate" study, inquiring into "ownership patterns in the broadcasting industry, with special emphasis upon the ownership of broadcast stations by licensees with substantial nonbroadcast interests." Conglomerate Corporation Licensees, 16 F.C.C. 2d 436 (1969). This proceeding is in its initial stages; comments have been submitted in the multiple ownership proceeding, however, and the matter is now pending before the Commission.

It is clear, we submit, that the subjects which seem to be the crux of appellant's complaint are being considered in an orderly fashion in public proceedings before the Commission. For this reason, as well as because of the substantive defects in the petitions to deny, there was plainly a reasonable basis for the Commission's refusal to hold an evidentiary hearing on

the renewal of licenses of the three network-owned television stations in New York City. As the Second Circuit recently stated:

> Adjudicatory hearings serve an important function when the agency bases its decision on the peculiar situation of individual parties who know more about this than anyone else. But when, as here, a new policy is based upon the general characteristics of an industry, rational decision is not furthered by requiring the agency to lose itself in an excursion into detail that too often obscures fundamental issues rather than clarifies them. See 1 Davis, Administrative Law Treatise §6.13 at p. 147 (1965 Pocket Part) and §7.01. WBEN, Inc. v. United States, 396 F.2d 601, 618 (2d Cir. 1968), cert. denied 393 U.S. 914. 16/

CONCLUSION

For the foregoing reasons the Commission's action should be affirmed.

Respectfully submitted,

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Federal Communications Commission
Washington, D. C. 20554

March 26, 1970.

16/ See also American Airlines, Inc. v. C.A.B., 123 U.S. App. D.C. 310, 359 F.2d 624, cert. denied 385 U.S. 843 (1966).

BRIEF FOR INTERVENOR
AMERICAN BROADCASTING COMPANIES, INC.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,601

ANTHONY R. MARTIN-TRIGONA,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

AMERICAN BROADCASTING COMPANIES, INC.,
COLUMBIA BROADCASTING SYSTEM, INC.,
NATIONAL BROADCASTING COMPANY, INC.,
Intervenors.

On Appeal from Memorandum Opinion and Order of
The Federal Communications Commission

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ANTHONY R. MARTIN-TRIGONA,
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COLUMBIA BROADCASTING SYSTEM, INC.,
NATIONAL BROADCASTING COMPANY, INC.,
Intervenors.

On Appeal from Memorandum Opinion and Order of
The Federal Communications Commission

BRIEF FOR INTERVENOR AMERICAN BROADCASTING COMPANIES, INC.

STATEMENT OF THE ISSUES[1]

Whether the Federal Communications Commission ("Commission") erred in holding that appellant lacked standing under Section 309(d) of the Communications Act of 1934, as amended (47 U.S.C. Sec. 309(d)) to contest the license

[1] This case not previously before this Court.

renewal application of television station WABC-TV, Channel 7, New York City; and whether the Commission erred in concluding that in any event appellant had failed to present any substantial and material questions of fact which would demonstrate that a grant of said renewal application would be *prima facie* inconsistent with the public interest.

REFERENCES TO RULINGS

The Memorandum Opinion and Order of the Commission which is the subject of this appeal was adopted September 24, 1969, and released October 13, 1969 (J.A. 63-68). It is officially reported in 20 FCC 2d 58, *sub nom. National Broadcasting Company, et al.*, 20 FCC 2d 58 (1969). The license renewal application of WABC-TV (BRCT-7) was granted by the Commission through its Broadcast Bureau on December 19, 1969, action from which no review was sought (Public Notice, released December 30, 1969, Report No. 8742).

COUNTERSTATEMENT OF THE CASE

In the interest of conserving the Court's time, intervenor American Broadcasting Companies, Inc. ("ABC") adopts the Commission's Counterstatement of the Case.

ARGUMENT

I.

THE COMMISSION DID NOT ERR IN HOLDING THAT APPELLANT FAILED TO SHOW THAT HE WAS A PARTY IN INTEREST WITHIN SECTION 309(d) OF THE COMMUNICATIONS ACT OF 1934, AND THUS THAT HE LACKED STANDING TO CONTEST THE LICENSE RENEWAL APPLICATION FOR WABC-TV.

Appellant bases his claim to standing principally upon his status as a "viewer" of ABC programming as well as on the basis of a form of "independent 'public interest' standing which exists," says appellant, "regardless of . . .

residence, location or relationship". In other words, appellant asserts the role of "ombudsman" for the American viewing public.

Recent decisions of the United States Supreme Court have attempted to define more precisely the "standing" concept, and have provided a somewhat more definitive two-part test for standing. *Association of Data Processing Service Organizations, Inc., et al. v. William B. Camp, Comptroller of the Currency*, 38 LW 4193 (March 3, 1970); *Clemon Barlow, et al. v. B. L. Collins, etc., et al.*, 38 LW 4195 (March 3, 1970).[2] Noting the overriding importance of the Article III restraints (which limits the judicial authority of the federal courts to *cases* and *controversies*), the Court set forth its two-part test of standing, first:

> "whether the plaintiff alleges that the challenged action has caused him *injury in fact*, economic or otherwise . . ."

and two

> "[w]hether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute . . . in question . . ." *Associated Data Processing, supra*, 38 LW 4193, 4194. (emphasis supplied).

In applying its test to the particular facts of those cases, the Court explained that the "interests to be protected" may reflect "aesthetic, conservational, and recreational" as well as economic values. Application of this test to the facts of the instant case show clearly the correctness of the Commission's holding below.

Assuming that competitive, anti-trust, and similar issues, as well as programming questions are within the "zone of interests" to be protected by the Communications Act – as we think we must – Mr. Martin-Trigona still has

---

[2] Essentially similar conclusions were reached by this Court in its decision in *Scanwell Laboratories, Inc. v. David H. Thomas, Administrator*, Case No. 22,863 (D.C.Cir. February 13, 1970).

failed to demonstrate that he has been "injured *in fact*" by the programming he has received. Mere allegations to this effect, or inferences from such allegations are manifestly insufficient to demonstrate such injury. In *Associated Data Processing & Barlow, supra,* the petitioners were not only *directly* injured – economically – by the acts complained of, but it was clear that they had already suffered such injury, or given the *status quo,* were going to in the near future. In the instant case Mr. Martin-Trigona has shown no injury either to himself or to the public in general. His statement that programming choices would be improved "but for" the ownership of WABC-TV by ABC is supported by no factual assertions as to the consequences in the event such ownership were terminated. Without enumeration of those consequences and their resultant effect upon the public it is impossible to say that "injury in fact" has or will occur from the grant of the renewal herein.

Appellant argues that under recent court decisions "consumers" have acquired standing to contest the actions of government agencies. This is true, and we do not take issue with that conclusion. However, such standing accorded to "consumers" must be viewed in the light of the Supreme Court's recent mandate on this subject, as well as by the constraints of Article III of the Constitution. In essence, appellant argues that because he is a "consumer" of ABC network programming he is entitled to contest the application for renewal of WABC-TV and the corporate policies of ABC. In addition he claims standing as "ombudsman" – a protector of the public interest. These bases for appellant's claim to "consumer-ombudsman" standing warrant further scrutiny.

Initially, appellant cites *Associated Industries of New York State v. Ickes,* 134 F.2d 694 (C.A. 2, 1943), as the landmark "consumer-standing" decision. However, a closer look at the facts of that case reveals a considerably stronger claim to standing than is present here – even under the Supreme Court's recent two-part test. In *Associated Industries, supra,* an association of New York industrial and commercial firms – many of which were substantial consumers of coal – filed a petition to review orders made by the Secretary of the Interior

which increased the minimum prices for bituminous coal sold in a designated market area which included New York. Standing was granted. There was no contention by respondents there that Congress did not intend the Bituminous Coal Act to safeguard the interests of consumers, only that those interests were, for purposes of court review, exclusively entrusted to the Bituminous Coal Consumers' Counsel, an office established by that same Act. As in the instant case, a section of the Bituminous Coal Act (Section 6(b)), expressly authorized "any person aggrieved by an order issued by the Commission" to seek review thereof. Referring to Supreme Court decisions in *Sanders Radio Station v. FCC*, 309 U.S. 470, 60 S. Ct. 693, 84 L.Ed. 869 (1940), and *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 62 S.Ct. 875, 86 L. Ed. 1229 (1942), the Court of Appeals stated:

> "*If*, then *one is a 'person aggrieved'*, he has authority by review proceedings under § 6(b) to vindicate the public interest involved in a violation of the Act by respondents, even if he can show no past or threatened invasion of any private legally protected substantive interest of his own." (emphasis supplied; 134 F.2d at 705.)

Thus, even under the dictates of the *Ickes* decision one must first be a *person aggrieved* before he can participate in agency proceedings and acquire "ombudsman" standing to vindicate the public interest. It is clear that in *Ickes*, the members of the Association would suffer such injury as to be "persons aggrieved." After all it cannot be doubted that the payment of unjust or unreasonable rates are injurious to the consumer. Absent the higher rates, it is obvious that the members of the Association would be better off – no such proof is offered by Mr. Martin-Trigona with respect to television programming he now receives, or with respect to the current composition of the television industry.

The decision on which appellant places the greatest reliance for his claim to standing is the landmark ruling by this very Court in *Office of Communication of the United Church of Christ v. FCC*, 123 U.S. App. D.C. 328, 359 F.2d

994 (1966), a decision readily distinguishable. There the appellants claimed standing before the Commission on the grounds that: (1) WLBT had denied them a reasonable opportunity to answer their critics, a violation of the Fairness Doctrine; (2) that the nearly one half of WLBT's potential listening audience whom they represented were similarly denied an opportunity to have their side of controversial issues presented, equally a violation of the Fairness Doctrine, and were more generally ignored and discriminated against in WLBT's programs; and (3) that they asserted a right of all listeners, regardless of race or religion, to hear and see balanced programming on significant public questions as required by the Fairness Doctrine. We would emphasize here that Mr. Martin-Trigona's broad generalizations in no way approach the specificity of the "injuries" claimed by petitioners in *United Church of Christ.*

Noting, initially, that no case granting the consuming public standing to challenge administrative decisions had ever been decided under the Federal Communications Act, this Court did conclude that broadcast consumers – *i.e.*, viewers – were to be treated like consumers of other products, and thus granted standing in appropriate cases. However, the holding of this Court in *Church of Christ* is totally inapplicable to the instant situation. And its applicability here is refuted by this Court's own language in that decision:

> "In order to safeguard the public interest in broadcasting, therefore, we hold that *some 'audience* participation' must be allowed in license renewal proceedings . . . but it does not necessarily follow that the Commission need allow the administrative processes to be obstructed or overwhelmed by captious or purely obstructive protests . . . these Appellants were *responsible spokesmen for representative groups having significant roots in the listening community.*" (emphasis supplied; 123 U.S. App. D.C. 339, 359 F.2d at 1005).
>
> * * *
>
> "As to these Appellants we limit ourselves to holding that the *Commission must allow standing to* one or more of

> them as *responsible representatives* to assert and prove the claims they have urged in their petition." (emphasis supplied; 123 U.S. App. D.C. 340, 350 F.2d 1006).
>
> ". . . the recurring theme in the legislative reports is . . . apprehension that standing *might be abused by persons with no 'legitimate' interest in the proceedings but with a desire only to delay the granting of a license for some private selfish reason.*" (emphasis supplied, 123 U.S. App. D.C. 335, 359 F.2d 1001).

Thus, it was made very clear that this Court did not intend in any way by its decision in *Church of Christ* to open up the floodgates of litigation to those with petitions as spurious as the one now before us, or to permit standing to those persons who possess no "ties" at all to the station's principal service area.

Thus, there is one principal distinction between the situation in *Church of Christ* and the instant case that stands out above all others. That is the appellant's viewing relationship *vis-a-vis* the challenged station.

In *Church of Christ*, all of the appellants were residents of the WLBT service area, obviously viewing that station regularly. This is patently not the case here as protestant has rarely, if ever, watched the broadcasts of WABC-TV — he being a resident of Urbana, Illinois, and WABC-TV being a New York City television station some 700 miles away. Despite his allegations to the contrary, protestant's viewing status is crucial here. That this is so is firmly supported by this Court's language in *Church of Christ* (cited above) which granted standing *only* for:

> "some '*audience* participation' . . ."
>
> * * *
>
> ". . . spokesmen for *representative groups* having *significant roots in the listening community.*"
>
> * * *
>
> "one or more . . . *responsible representatives.*"
>
> * * *

but *not* to:

> "*persons with no legitimate interest* in the proceedings but with a desire only to delay the granting of a license for some private selfish reason."

Protestant here is not a member of the "audience" of WABC-TV; he is not a spokesman for either persons or groups having "significant roots in the listening community," and he is not a responsible representative of the "viewers" of WABC-TV. Thus, protestant although relying on *Church of Christ* as the basis for his claim to standing, has failed to fulfill any of the requirements for standing which this Court set forth in that decision.

Of equal importance here is the fact that Mr. Martin-Trigona seeks to alter the television programming he receives – not by challenging the license of his local station – but, as he says, by attacking the "source" of the programming, ABC, as the licensee of WABC-TV. This, however, misconceives the basic nature of the Communications Act to provide effective local broadcast service to each community in the nation. In pursuit of this goal the Commission places the responsibility for operations and programming on each individual station licensee. Contrary to appellant's statement that as a practical matter each affiliate is subject to the dictates of the network, as an operational and legal matter the licensee of each station can and must operate his facility in the public interest – regardless of network demands and wishes. He cannot escape that responsibility by the mere excuse that economics forces him to accept programming from only one or several sources. Clearly, then, appellant's recourse, if any, is to his local station in Urbana – not WABC-TV. He is a viewer of the Urbana outlets – not WABC-TV. He is a resident of Urbana, not New York City. He is a "consumer" of his local station's programming policies – not WABC-TV's. And he only has standing – if he has standing at all – to challenge the local station's renewal – *not WABC-TV's.* Since the basic nature of television service itself is local, appellant has standing to contest license renewals only as a "local consumer" of television programming – not as a national "ombudsman".

In this same regard we would note that in *Associated Industries, supra,* upon which appellant places such heavy reliance, the consumers seeking standing there were corporate residents of the New York area – the very market to which the actions they contested were directed. Even more recently the Federal Communications Commission has dismissed for lack of standing, petitions filed by Mr. Martin-Trigona to revoke the licenses of all of the Metromedia, Inc. television stations. Memorandum Opinion and Order, FCC 70-228 released March 2, 1970 (Attached as Appendix I hereto).

The Commission stated:

> ". . . And as for 'viewer status' standing under *United Church of Christ* . . ., we note that Martin-Trigona is not even a resident of Chicago, but lives in Champaign, Illinois, which is located outside WFLD-TV's coverage area. Accordingly it appears that his viewing of WFLD-TV's programming is restricted to those times when he visits Chicago. Petitioner refers to no decision extending 'viewer' standing to a non-resident transient who may occasionally watch a television station in a community he visits, and we are aware of none." (p. 2, n. 1).

Mr. Martin-Trigona has demonstrated no overriding public interest considerations which would warrant this Court from diverting from the *fundamental* holdings of these cases to grant standing only to those persons who can show "injury in fact" as a result of administrative action, and, in the instant case, to those persons who are *responsible spokesmen for the listening public having significant roots in the community.* Appellant does not comply with either of these criteria. He fails to demonstrate the kind of concrete, adversary interest required by the statute and the Constitution. Appellant, failing to show that he is a "party in interest," cannot acquire standing to contest the renewal application of WABC-TV.[3]

---

[3] Not being a "party in interest" before the Commission, under Section 309(d) of the Communications Act as amended, appellant has no standing to bring this appeal as he is therefore not a "person aggrieved" or "adversely affected" within the meaning of Section (Cont'd.)

II.

THE COMMISSION PROPERLY FOUND (1) THAT APPELLANT PRESENTED NO SHOWING AS TO HOW GRANT OF THE RENEWAL APPLICATION HEREIN WOULD BE *PRIMA FACIE* INCONSISTENT WITH THE PUBLIC INTEREST, CONVENIENCE AND NECESSITY; AND (2) THAT THERE ARE NO SUBSTANTIAL AND MATERIAL QUESTIONS OF FACT TO WARRANT A HEARING UNDER SECTION 309(e) OF THE COMMUNICATIONS ACT OF 1934.

In order to obtain standing under Section 309(d) of the Communications Act, a party must include in his petition "specific allegations of fact" sufficient to show that he is a party in interest, *and*, to warrant consideration by the Commission "specific allegations of fact" that a grant of the application he opposes would be "*prima facie* inconsistent" with the public interest, convenience, and necessity. Since we have shown that protestant has failed to meet the first of these requirements – the showing required under Section 309(d) being conjunctive – it is unnecessary to proceed further. However, even assuming that appellant has the requisite "standing", he has failed to make "specific allegations of fact" to demonstrate that grant of the renewal application herein would be *prima facie* inconsistent with the public interest, convenience, and necessity.

Initially, we would reiterate the Commission's conclusions on this issue, namely that:

> "The petitioner has nowhere set forth facts that show the networks to be in violation of any law, Commission policy or rule . . . petitioner's pleadings recite conclusions, not factual allegations. They are replete with pejorative language, highly individual opinions and unsupported and unsubstantiated accusations . . . no such showing of serious

---

3 (Cont'd.)
402(b) of the Communications Act. A "party in interest" is one who is "aggrieved" or whose interests are adversely affected. *Camden Radio, Inc. v. FCC*, 94 U.S.App.D.C. 312, 220 F.2d 191 (1954); *Metropolitan Television Co. v. U.S.*, 95 U.S.App.D.C. 326, 221 F.2d 879 (1955).

> questions is made here; rather there is an absence of any specific showing of abuse, law violation or discernible overriding public interest concern." (Footnote omitted, J.A. 66, 67).

The Commission's summarization of appellant's spurious allegations are correct in every respect. Nowhere, indeed, has he presented any factual assertions that would demonstrate just in what particular way grant of the renewal application of WABC-TV would be *prima facie* inconsistent with the public interest, convenience, and necessity.

For example, appellant complains that ABC uses profits from its owned and operated stations (including WABC-TV) to subsidize its network activities, and that this gives ABC an inherent unfair competitive advantage which discourages the entry of new competitors into the networking field. However, appellant has failed to make any substantive showing in this regard. He offers no specific example of the occurrence of such developments. Moreover, it is the ownership of such stations which is crucial to effective networking. It is the absence of such ownership which, in fact, restricts entry. Appellant's conclusion in this regard is completely contrary to the Commission's extensive and well-developed expertise in this area.

An essentially similar argument to that made by protestant herein with respect to concentration of control of the mass media of communications was made by petitioners in *Hale, et al. v. FCC,* Case No. 22,751 (D.C. Cir. February 16, 1970), where the renewal application of KSL, Salt Lake City, was being challenged. To that argument this Court stated:

> "Appellants do assert that this particular concentration [of business and broadcasting influence in the Salt Lake City communications market] has had ill effects on the communications media in Salt Lake City, and is thus not in the public interest. But here again, to merit a hearing under Section 309(e), *appellants must go beyond generalization and allege some specific instances of injury in the immediate context of the intervenor's operations,* not merely

> that it is unwise for newspapers to be under common ownership with radio and television interests, and for both to be part of a broader business combine." (Slip. op. p. 5).

Appellant also argues that the "public interest would be better served, both locally and nationally, if the currently network-owned stations in New York were 'freed' and allowed to choose affiliation or programming service independently of parent corporation network policy." (J.A. 11). But again Mr. Martin-Trigona fails to show with any degree of specificity – or, in fact, at all – just *how* the public interest would be better served by eliminating from New York, and presumably the nation, the very great and beneficial resources not only of ABC – but those of Columbia Broadcasting System and National Broadcasting Company as well.

Appellant, in rebuttal to the Commission's decision, states that the FCC has "introduced a test of impossibility in making a substantive showing." (App. Br. 18). But there is no impossibility involved here – only a total absence of fact, incident or example on which appellant could make good his spurious claims. It is true that appellant offers some description of ABC activities, but he only offers to show how these activities offend his particular sensibilities; he does not offer to show how they violate any law or Commission policy.

In each of these instances appellant has failed to raise "specific allegations of fact" that demonstrate that grant of the renewal application of WABC-TV would be *prima facie* inconsistent with the public interest, convenience and necessity. Thus, the Commission, finding the application for renewal herein to be satisfactory in all respects, properly found that there were no "substantial *and* material questions of fact" to warrant a hearing under Section 309(e) of the Communications Act of 1934.

III.

THE COMMISSION ACTED PROPERLY IN (1) FIRST DISMISSING THE PETITION FOR LACK OF STANDING AND THEN DISCUSSING THE MERITS OF APPELLANT'S CLAIM; AND (2) FINDING THAT PENDING RULEMAKING PROCEEDINGS ARE THE PROPER CONTEXT IN WHICH TO CONSIDER APPELLANT'S SUBSTANTIVE ALLEGATIONS.

Appellant contends that "[n]o administrative tribunal has the right to dismiss petitions, and then, having denied Petitioner an opportunity to participate to . . . 'adjudicate' the contents of the petitions." (App. Br. 32). This, says appellant, is arbitrary and an abuse of discretion. While the Commission did discuss the merits of appellants' claim in the context of the statutory requirements for standing this in no way prejudices appellant's case. We assume that if reversed and remanded by this Court, appellant would have the right to introduce further evidence in support of his claims and be entitled to a fresh determination by the Commission on the basis of such submissions. In any event this Court – and others – have held that such action as appellant here complains of, is not arbitrary, unreasonable *or* an abuse of discretion. *NBC v. FCC,* 124 U.S. App. D.C. 116, 362 F.2d 946 (1966). In addition the Commission has frequently followed such procedure in attempting to clarify positions and explain its policies. *Arkansas Radio & Equipment Co.,* 2 FCC 2d 429, 6 RR 2d 734 (1966); *Microwave Service Co.,* 8 RR 2d 1055 (1966); *A-C Broadcasters,* 10 FCC 2d 256, 11 RR 2d 359 (1967); *Mel-Eau Broadcasting Corp.,* 10 FCC 2d 537, 11 RR 2d 655 (1967).

Moreover, we would note that the Act only requires the Commission to find – *on the basis of the application, the pleadings filed, or other matters which it may officially notice* – that there are no "substantial and material questions of fact." (Section 309(d)(2), Communications Act of 1934). As the court stated in *Powelton Civic Home Owners Assoc. v. Dept. of HUD,* 284 F. Supp. 809 (USDC ED Pa. 1968) all that is required is to:

> ". . . afford the [Appellant] . . . an opportunity equal to that available to the [other parties] . . . to submit written

> and documentary evidence on the legality [of the matter] . . ." (284 F. Supp. at 831, 832).

The Commission has satisfied this requirement.

While the Commission did discuss appellant's substantive claims, it by no means "adjudicated" them in any usual sense of the word. In fact, the Commission stated explicitly that it is "exploring the general issues" raised by appellant in the context of pending rulemaking proceedings.[4] Appellant argues that the effect of the Commission's decision herein "would effectively insulate national networks from any form of meaningful license renewal interrogation," (App. Br. 13) and, similarly, that "[i]f the Commission position is followed to its logical conclusion . . . there is no realistic way that a member of the public can challenge economic concentration in network ownership and operations." (App. Br. 23). This is altogether untrue. As licensees of the public's trust, the networks as owners of broadcast facilities must live up to the same public interest standards as all other licensees. More importantly, *any* interested person may seek to challenge alleged economic concentration in networking, or program control, or any other matter, via petitions for rulemaking and/or participation in current rulemaking proceedings as the Commission suggests. This is where the public can most effectively participate.

The Commission's decision herein to consider appellant's broad allegations in the context of pending rulemaking proceedings is the Commission's choice as the best means to the proper dispatch of its business and to the ends of justice (as permitted by Section 4(j) of the Communications Act, 47 U.S.C. Sec. 154(j)); and that determination should be respected by this Court. As the Supreme Court stated in *SEC v. Chenery Corporation,* 318 U.S. 80 at 94, 87 L.Ed. 626 at 636 (1942):

---

[4] Multiple ownership and concentration issues in the so-called one-to-a-customer proceeding, Docket No. 18110, 33 Fed. Reg. 5315 (April 3, 1968); conglomerate matters by a Notice of Inquiry, adopted February 7, 1969, in Docket No. 18449 (16 FCC2d 436); and network control of programming in the 50-50 rulemaking Docket No. 12782.

> "If the action rests upon an administrative determination – an exercise of judgment in an area which Congress has entrusted to the agency – of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so.";

and again in *FCC v. WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 93 L.Ed. 1353 (1949):

> ". . . Necessarily, therefore, *the subordinate questions of procedure* in ascertaining the public interest, when the Commission's licensing authority is invoked – the scope of the inquiry whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions – *were explicitly and by implication left to the Commission's own devising . . .*" (emphasis supplied; 337 U.S. at 283, 93 L.Ed. at 1364).

And, only very recently in *Hale, et al. v. FCC*, Case No. 22,751 (D.C. Cir. February 16, 1970), where appellants had challenged the renewal application of KSL, Salt Lake City, this Court aptly observed:

> "*There is a rational foundation for the Commission's position that a basic change in policy such as appellants here seek is better and more fairly examined and considered in rule-making proceedings, where the inquiry can be thorough and where all interested parties can participate.* Appellants' protests seem to us to assert that undue concentration of communications media has a tendency towards adverse impact on the public interest which warrants a policy of flat prohibition without reference to whether there are incidental injuries in fact. But this is the very question which the Commission is presently pursuing in actual rulemaking and in investigations looking toward rulemaking. *That pursuit may be more effectively and properly carried on there than by setting this renewal application down for hearing with a view to a change in policy with respect to this particular applicant.*" (emphasis supplied; Slip Op., pp. 6, 7).

This Court must agree, therefore, as it did in *Hale, supra,* that the Commission committed no abuse of discretion here and properly deferred taking up appellant's substantive allegations for consideration in the context of pending rule-making proceedings where a detailed and thorough analysis can proceed in a logical manner.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed.

Respectfully submitted,

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Companies, Inc.

March 26, 1970

APPENDIX I

FCC-70-228
43526

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Petition of	)
	)
ANTHONY MARTIN-TRIGONA	)
(PETITIONER)	)
	)
and	)
	)
WNEW-TV; WTTG(TV); KTTV(TV);	)
KNEW-TV; and KMBC-TV, all owned	)
and operated by Metromedia, Inc.	)
(RESPONDENTS)	)
	)
For Revocation of Licenses	)

MEMORANDUM OPINION AND ORDER

Adopted: February 26, 1970 ; Released: March 2, 1970

By the Commission: Commissioner Johnson dissenting for the reasons stated in his opinion 20 FCC 2d 58, 61 (1969).

1. On October 5, 1969, Anthony R. Martin-Trigona filed a "Petition to Revoke Broadcast Licenses", directed against all of Metromedia, Inc.'s television stations. This petition was filed in connection with an earlier proposal to assign the license of Station WFLD-TV, Chicago, Illinois from Television Chicago, A Joint Venture, to Metromedia, Inc., (BALCT-382). On February 2, 1970, Metromedia informed the Commission that it had terminated the contract on which the assignment application was based, and requested dismissal of that application. That application was dismissed, as was also a "Petition to Deny Transfer of Control" filed by Martin-Trigona against the assignment application.

2. There remains for consideration the "Petition to Revoke Broadcast Licenses." The authority on which this petition is based is not clear. Presumably, it rests on Section 312 of the Communications Act, 47 U.S.C. 312, although the affidavit attached to the petition recites compliance with Section 309(d)(1) of the Communications Act.

3. The petition must be dismissed because petitioner lacks standing,[1] and because his petition is without basis. The institution of revocation proceedings under Section 312 of the Communications Act is a matter left to the discretion of the Commission. Compare Sections 312 with 307(d), 309. We find nothing in the petition to revoke to justify instituting revocation proceedings.[2]

---

[1] The petition to revoke, which was attached to a Martin-Trigona letter in reply to motions to dismiss his "Petition to Deny Transfer of Control", sets forth no claim to standing. Presumably, petitioner has relied on his allegations of standing set forth in his earlier petition to deny. But these allegations are unavailing for several reasons. See *National Broadcasting Co.*, 20 FCC 2d 58, at 59, for a decision denying Martin-Trigona "public interest" standing in connection with his petition to revoke filed against the "flagship" network television stations in New York City. As for the claim that Martin-Trigona will suffer economic injury because he intended at some future time to apply for a television station in Chicago, that claim has become moot with the dismissal of the assignment application. In any event, Martin-Trigona would have no standing as a future possible applicant. See *Mansfield-Journal Co. v. Federal Communications Commission*, 173 F.2d 656, 4 RR 2123. And as for "viewer status" standing under *United Church of Christ v. Federal Communications Commission*, 359 Fed. 994, 7 RR 2d 2001, we note that Martin-Trigona is not even a resident of Chicago, but lives in Champaign, Illinois, which is located outside WFLD-TV's coverage area. Accordingly, it appears that his viewing of WFLD-TV's programming is restricted to those times when he visits Chicago. Petitioner refers to no decision extending "viewer" standing to a non-resident transient who may occasionally watch a television station in a community he visits, and we are aware of none.

[2] Representations respecting the reasons for an earlier-abandoned application looking to a merger between Metromedia and Transamerica Corporation were not at variance with representations in Metromedia's proposal to acquire WFLD-TV (BALCT-382). The applications were not contingent on each other and the Commission was so informed. Moreover, a comparison of the two applications indicates they differed materially in scope and that the WFLD-TV proposals were considerably narrower than those in the Metromedia-Transamerica merger application. With respect to the second ground asserted to support revocation proceedings, the petition is devoid of any factual allegations tending to indicate that Metromedia has ignored programming for minority needs in the markets where Metromedia operates television stations. And the charge that a callous disregard for minority needs is evidenced by Metromedia's proposal to hire ". . . one Black professional" for the WFLD-TV news staff is without merit, resting as it does on a complete misreading of Exhibit 9 (page 2) of the transfer application (BALCT-382).

4. Accordingly, IT IS ORDERED, That the Petition to Revoke Broadcast Licenses filed by Anthony R. Martin-Trigona, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

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FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

BRIEF OF ANTHONY R. MARTIN-TRIGONA AS APPELLANT

In the

UNITED STATES COURT OF APPEALS
for the District of Columbia

No. 23,601

Anthony R. Martin-Trigona,

Petitioner

v.

Federal Communications Commission and
United States of America,

Respondents.

American Broadcasting Companies, Inc.,
Columbia Broadcasting System, Inc.,
National Broadcasting Company, Inc.,

Intervenors.

PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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Oral Argument Requested

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STATEMENT OF QUESTIONS PRESENTED

1. Whether Petitioner Anthony R. Martin-Trigona (hereafter "Petitioner") satisfies the requirements of 47 U.S.C.A. 309 (d) (1) so as to have standing before the Federal Communications Commission (hereafter "Commission") to intervene in license renewal proceedings of the owned and operated stations of the three national networks, the American Broadcasting Companies, Inc. (hereafter "ABC"), the Columbia Broadcasting System, Inc. (hereafter "CBS") and the National Broadcasting Company, Inc. (hereafter "NBC").

2. Whether petitions by Petitioner concerning renewal of ABC, CBS and NBC owned and operated stations presented "substantial and material questions of fact" such as to require Commission hearings on the renewal applications of the stations in question, under 47 U.S.C.A. 309 (e).

3. Whether the informal and contradictory adjudication of the Commission in the instant proceeding is void and constitutes administrative abuse of process.

A. This case has not previously been before the Court.

REFERENCES AND RULLINGS

1. The decision of the Federal Communications Commission in the proceedings under review was adopted September 24, 1969 and released October 13, 1969, as FCC 69-1041 et seq.

2. The file numbers of the renewal proceedings concerning WNBC-TV, WCBS-TV and WABC-TV were, respectively, File numbers BRCT-1, BRCT-3 and BRCT-7.

STATEMENT OF THE CASE

Petitioner filed with the Commission on May 28, 1969, a "Petition to Revoke Broadcast License" for WABC-TV, WCBA-TV and WNBC-TV, all of New York City, claiming violations by the network licensees of anti-trust laws, concentration of media control violations and conglomerate conflicts of interest, and praying a hearing on these three issues alone, and revocation of the station licenses.

After responses by ABC, CBS and NBC (dated June 16, 17, 11, respectively) and reply comments by Petitioner, the Commission decided to treat the petitions as petitions to deny renewal applications since the renewal applications were still pending. On September 24, 1969 the Commission dismissed Petitioner's petitions for want of standing, and also "ruled" on the merits of the petitions, whence this petition for review is taken. The appeal was docketed on October 29, 1969.

In the
UNITED STATES COURT OF APPEALS
for the District of Columbia

No. 23,601

Anthony R. Martin-Trigone,

Petitioner,

v.

Federal Communications Commission,
United States of America,

Respondents.

American Broadcasting Companies, Inc.,
Columbia Broadcasting System, Inc.,
National Broadcasting Company, Inc.,

Intervenors.

PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

SUMMARY OF ARGUMENT

1. Standing is an informal rule of practice designed primarily to regulate the flow of work in both administrative and judicial tribunals. In recent years standing requirements have been continually lessened and barriers to litigation by taxpayers and interested partys have been partially or wholly removed. Standing should not be used to eliminate a party if in fact that party is the only effective or organized advocate of an important policy or question of public policy. Petitioner clearly established his standing before the Commission, based on his own extrinsic

qualifications and the enormous influence, impact and power of the networks. Petitioner satisfied the broad requirements of modern day standing, and also came within the more limited requirements of the leading case concerning standing before the Commission itself. There is impressive and important authority, moreover, in the action of the Supreme Court of the United States in recognizing and permitting a special form of consumer intervention and advocacy where important matters of public policy are an issue.

2. Petitioner also raised important questions of fact and law which required a hearing on the renewal applications by the Commission. There is compelling authority for this view within the Commission itself, that the Commission cannot use its procedural powers to eliminate hearings on the merits merely because the majority view of the Commission on the merits may not coincide with that of petitioner. The rule making proceedings which are so often relied upon as a defense to inaction by the Commission should be recognized as an inadequate and often interminable response to an awesome and compelling public mandate, and clearly insufficient indication that the Commission has taken or will take action consistent with the anti-trust laws and other important policies of the United States. The defense of the Commission that the licensees violate no policy of the Commission itself is fallacious, since the anti-trust laws and their adjunct laws supercede mere Commission policies where there is no statutory intent to do otherwise.

There is, moreover, substantial public sentiment for the position advocated by the petitioner by individuals from every section of the nation and every political persuasion, and correlative support for consumer

intervention. To obviate the need for political intervention at the Commission, the Commission must exercise its legal mandate and take action when serious and important policy questions are presented by a member of the public.

In its haste to dismiss the instant petitions the Commission misconstrued and misinterpreted the substance and nature of the petitions, so as to make them seem what they were not, and to dismiss them on this hypothecated basis.

3. The action of the Commission in denying standing, and then "discussing" the merits of petitioner's arguments is an abuse of administrative process. Petitioner was given no opportunity to participate and be present at any hearing while his petitions were misconstrued and misrepresented, and while the Commission "discussed" issues which were not contained in the petitions and which were of no relevance save the Commission's desire to dismiss the pleadings. Under the circumstances, the petition's discussion of the merits was arbitrary, capricious and void. It should be reversed and a meaningful hearing held on the renewal applications with petitioner being given a sincere and good faith opportunity to participate in the hearing process.

ARGUMENT

Point I

PETITIONER HAS CLEARLY ESTABLISHED STANDING TO INTERVENE IN THE RENEWAL OF ABC, CBS, NBC OWNED AND OPERATED STATIONS.

A. PETITIONER SATISFIED THE GENERAL REQUIREMENTS OF STANDING AS ESTABLISHED IN CURRENT CASE LAW.

The concept of standing has undergone constant liberalization and refinement in recent court decisions. In the petitions, Petitioner advanced four different reasons for according standing in the instant proceedings. In his dissent (Johnson, p. 3), Commissioner Johnson concluded: "I feel that a grant is justified on the fourth basis, which encompasses the other three...Petitioner asserts, fourth, that he has standing to bring this case because of an 'independent public interest' standing..."

In Powelton Civic Home Owners' Association v. HUD, 284 F. Supp. 809 (D. C. Pa. 1968) at 826, the court stated:

> Neither economic injury nor a specific, individual legal right are necessary adjuncts to standing. A plaintiff need only demonstrate that he is an appropriate person to question the agency's alleged failure to protect a value specifically recognized by federal law as 'in the public interest;' he may then invoke judicial scrutinization of the agency's performance in protecting or failing to protect that specific value. He has standing to ask whether the agency action is violative of the public interest.

For many years, federal taxpayers were prohibited from bringing "taxpayers suits" against federal government expenditures under the doctrine in Frothingham v. Mellon, 262 U.S. 447 (1923). This restriction against taxpayer litigation was distinguished and substantially removed in Flast v. Cohen, 392 U.S. 83, 99-100 (1968), where the Supreme Court decided to permit a challenge against federal expenditures for parochial education and substantially lifted the taxpayer suit barrier. Similarly, for many years, reapportionment was thought to be beyond the realm of judicial intervention. The lankmark case of Baker v. Carr, 369 U. S. 186, 204 (1962) held that reapportionment suits were justiciable, and that a litigant need only establish "a personal stake

in the outcome of the controversy," to have standing.

In Barrows v. Jackson, 346 U.S. 249, 257 (1953) the Supreme Court held that standing "which is only a rule of practice, is outweighed by the need to protect the fundamental rights which would be denied by (not allowing the action to be brought)." In Barrows, as in the instant case, the Petitioners may be the only effective advocate of the position being espoused. Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 240 (1937) stated that parties must have "adverse legal interests" to insure that the case is presented in a concrete and definitive manner. It is clear that Petitioner, on the one hand, and ABC, CBS and NBC, on the other, have "adverse legal interests."

Although the term "private Attorney General" has gradually yielded to its imported counterpart, "ombudsman," the legal effect of the two is almost identical. Associated Industries v. Ickes, 134 F. 2d 694, 704 (2d Cir.) rev'd as moot per curiam, 320 U.S. 703 (1943) stated that "There is nothing prohibiting Congress from empowering any person official or not, to institute such a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest. (emphasis added) Such persons, so authorized, are, so to speak, private Attorney Generals."

The Commission made no showing that the Petitioner was an unfit party to represent the public interest. It applied its rote test of standing and "dismissed" the petitions, but it made no finding that the Petitioner was unable or unfit in any manner to represent and actively advocate the consumer interest in network policies and practices. It made no inquiry into whether the substantial and important questions presented by Petitioner had been raised in similar or analogous petitions,

or whether it felt that the "ombudsman" test of standing would be proper if Petitioner represented a group of individuals asserting essentially the same arguments.

Standing is an amorphous concept; courts have tried to limit its restrictive impact, particularly in areas where there are limited numbers of individuals with the inclination or experience to confront major economic concentrations. As Commissioner Johnson's dissenting opinion pointed out (Johnson, pp. 3-4):

> It is important to note that the policies underlying the doctrines of standing to participate in renewal proceedings before this Commission differ importantly from standing doctrines normally applied by the courts...A court may wish to spare a defendant the burden of defending himself where the trial might otherwise be <u>completely avoided</u>--that is, where the plaintiff lacks the involvement required for standing. In FCC license renewal proceedings, however, an examination of the licensee's past record and future proposals can <u>never</u> be avoided--for this Commission is <u>required</u> by statute to conduct an examination...The question is not whether the licensee will be spared the "burden" of defending his prior three-year record, but whether in the process of making that defense he will be required to respond to public interest arguments which the FCC should be raising, <u>but which are more easily raised by members of the public</u>.

It is important to note that in the three years since the station licenses were last renewed, important changes have taken place in the corporate structure of the major networks. Additional acquisitions have been made, and old acquisitions have been consolidated and expanded. All three networks have entered into varying amounts of feature film production for their respective networks, and ABC has expanded film production not only for network purposes, but also for its chain of motion picture theaters. "For this Commission to deny standing to the Petitioner is to retreat into the realm of legalisms and forsake its

duty to serve the public interest," (Johnson, p. 4).

It may be that a majority of the Commission would rule against the Petitioner on the merits of his arguments. Even if this be the case, it is no basis for denial of standing and refusal of a hearing. The procedural aspects of the arguments must be judged separately from the merits of the arguments. Whether or not a majority of the Commission is in agreement with the arguments advanced by Petitioner is irrelevant; if the issues presented are substantial and material a hearing must be held. The Commission cannot use its procedural powers to deny petitions merely because the sympathies of the majority are opposed to the views of the petitioner's on the merits. The Commission has a responsibility to hear competing viewpoints even if it disagrees with the views. Similarly, it should not use the "standing" power to eliminate arguments which the majority may not favor on their merits.

Standing is an informal rule of procedure. There has been a gradual erosion of harsh results which often occurred under conventional standing doctrines. Consumer activism is further reducing the impact of standing on overall procedure. The Petitioner, in his pleadings, has satisfied the requirements for standing under collective arguments and individual merits. As the dissent points out, (Johnson, p. 5) "If the case is dismissed on a procedural technicality then a crucial issue of public policy might never be advanced. It is both logical and consistent with precedent for a party, willing to argue the public interest, to be granted standing as a representative of the public."

The only real basis on which the Commission appears to deny standing is the geographical location of the petitioner. Presumably, if petitioner lived within the technical limits of reception of the stations in question, the standing issue would be vacated. To deny access to the Commission during renewal of stations of national network licensees, whose impact is felt in every television home in the United States, appears unrealistic. As the original petition pointed out, "in the case of group or multiple station owners, standing requirements must be interpreted liberally to conform with the national and nation-wide broadcasting influence of these colossal corporate licensees," (Petition, p. 3). Certainly the Commission does not question that the vast majority of the prime time programming presented in Champaign-Urbana, Illinois is prepared in New York, not Champaign, and that the logical place to challenge policies is at their heart, not on the peripheries. Petitioner has clearly shown that "ombudsman status intervention" as a representative of broad public and consumer interests is consistent with the legal mandate of the Commission and the "necessity and convenience" and interest of the Commission in regulating the national networks.

B. PETITIONER SATISFIES THE REQUIREMENTS OF STANDING AS APPLIED TO PROCEEDINGS BEFORE THE COMMISSION.

The landmark case in Commission standing is the United Church of Crist v. FCC, 359 F.2d 994 (D. C. Cir. 1966). Since both the Petitioner, and the Commission and networks, rely on the case for opposite viewpoints, the case merits special consideration.

At 1003, the Court stated: "...Hence, individual citizens owe a duty to themselves...to take an active interest in the scope and quality of television service which stations and networks provide and which, undoubtedly, has a vast impact on their lives and the lives of their children..." The court was quoting the Commission, which seems to be suggesting that "individual citizens" owe a duty to themselves to take an active interest in the "...scope and quality of service... networks provide..." This is a contradictory position from that the Commission is now taking.

The court implicitly covers elements of standing when it states at 1003:

> The theory that the Commission can always effectively represent the listener interests in a renewal proceeding without the aid and participation of legitimate listener representatives fulfilling the role of private attorneys general is one of those assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear, as it does to us now, that it no longer is a valid assumption which stands up under the realities of actual experience, neither we nor the Commission can continue to rely on it. The gradual expansion and evolution of concepts of standing in administrative law attests that experience rather than logic or fixed rules have been accepted as the guide..."

To see how the Commission reacted to the decision of this court, and how the revised standing rules were interpreted and applied by the Commission with regard to the successful intervenors, it is necessary to move forward to 1969, to further proceedings in the United Church of Crist case (hereafter "UCC") where the Court stated:

> The record now before us leaves us with a profound concern over the entire handling of this case following the remand to the Commission. The impatience with the Public Intervenors, the hostility toward their efforts

> to satisfy a surprisingly strict standard of proof, plain errors in rulings and findings lead us albeit reluctantly, to the conclusion that it will serve no useful purpose to ask the Commission to reconsider...The Administrative conduct reflected in the record is beyond repair. (No. 19,409, Decided June 20, 1969, U.S.C.A., D. C. Cir.)

In its instant decision, the Commission notes that the UCC decision "stated the Commission might adopt appropriate regulations in this field to delineate which challengers represent responsible community groups or organizations, (Decision, p. 3). The Commission has formulated no such rules, largely because the number of individuals seeking to intervene is so small. Yet, even in the cited segment of the decision, the Commission seems to rule out intervention by "individuals" and replies exclusively on "group" intervention. Clearly such a proposition cannot be allowed to stand. The Commission has made no finding that petitioner is not a responsible party, and bases its dismissal entirely on the fact that petitioner lives outside New York City. The Commission, by negative action, seems to feel that networks must be effectively insulated from challenge except by local groups in a handful of cities. All three networks own stations in New York, Chicago and Los Angeles, and there are network owned stations in Washington, D. C., Philadelphia, San Francisco, Detroit, St. Louis and Cleveland. If one follows the logic of the Commission to its reasonable conclusion, only individuals living within the service area of those nine cities would be able to challenge and question national network policies or intervene to force Commission complicance with anti-trust laws. This is a preposterous conclusion.

To posit that only a small segment of the population (See Petition, p. 5), roughly 19%, has any right or standing to challenge network policies

and impact means that the other 81% are effectively denied Commission access to intervention in matters which directly affect every television viewer in the United States. Petitioner chooses to live in Champaign-Urbana because of clean air, small community life, convenience, etc. This does not mean that he abrogates his right to question and influence national network policies, which by their own admission, influence and impact on every American. To arrive at such a result can only exacerbate tensions between the viewing public and the networks, and in the long run create new and more serious problems for the Commission, not solve the Commission's perennial difficulties. The logic of the Commission's decision, denying standing on the basis of residence, is clearly fallacious, since it would effectively insulate national networks from any form of meaningful license renewal interrogation by all but a small minority of the American people. Such an unconscionable result should not be sanctioned by an agency which is charged with administering the broadcast media in the national interest. The Commission, moreover, advocates no indigenous solution to this problem. It fails to recognize that its ruling has the effect of eliminating 81% of the American people (approx.) from challenging network policies and practices. By its own admission, the Commission has declined to take direct jurisdiction over network policies; the only effective level which it attempts to exercise, and which it will be able to exercise in the forseeable future, is license renewal of network owned stations. Yet it has now eliminated 81% of the American people from participation in such proceedings.

The one logical basis on which the Commission might uphold restrictive standing requirements has been mooted by the Commission and negated by this Court. Originally the Commission argued that liberalized standing would flood the Commission with consumer and public interest petitions. As this Court observed in the second UCC decision of 1969, "The fact that no additional intervenors brought their case to the Commission substantiates our earlier observation that: 'That fears of regulatory agencies that their process will be inundated by expansion of standing criteria are rarely born out.'" In the instant case, it would be a near impossibility for the Commission to be inundated by additional petitions of similar substance. The petitions are comprehensive in their allegations of economic injury issues and almost sui generis since they encompass practices of all three networks. Therefore, there cannot be any fear that the Commission, by holding hearings in the instant petitions, would be inundated. Once decided, either for or against the network licensees, there are no more networks and no more stations to consider. Similarly, as this court pointed out in the original UCC decision "Always a restraining factor is the expense of participation in the administrative process, an economic reality which will operate to limit the number of those who will seek participation...Moreover, the listening public seeking intervention in a license renewal proceeding cannot attract lawyers to represent their cause by the prospect of lucretive contingent fees..," at 1006.

It is clear that the Commission and the networks have taken a far more restrictive view of the original UCC decision than was taken by other courts and by the public itself. Certainly the administrative

agency has a need to protect itself from petitions devoid of any substance whatsoever. But when there is a minority within the Commission itself which favors fulfillment of the legal mandate to hear and adjudicate serious and substantial economic issues, the Commission has a moral and legal duty to hold license renewal hearing under procedures proscribed by law.

In the original UCC case the court stated, at 1005, "In order to safeguard the public interest in broadcasting we hold that some 'audience participation' must be allowed in renewal hearings." A fortiori, to safeguard the public interest in regulating the power of the national networks, some public participation must not artificially be restricted by limiting intervention to owned and operated cities. At 1006 the court stated "The usefulness of any particular petitioner for intervention must be judged in relation to other petitioners and the nature of the claims it asserts as a basis for standing." The Commission has not shown that it is making any meaningful attempt to regulate network practices and expansion (In the case of ABC, the Commission continually approved mergers, which were finally halted by the Department of Justice), and the Commission has not shown, in dismissing petitioner's petition, that it has under consideration or advisement from residents in the immediate service area, any substantially similar petitions which would cause it to hold a hearing and consider the issues. Inasmuch as the Petitioner has made a concerted responsible effort to present a sound case for intervention, and the Commission has failed to establish any basis save geographic location why Petitioner cannot be allowed to intervene, the decision of the Commission must be reversed.

If costs of litigation are an inherent restraining factor on intervention by local groups in license renewal proceedings, a fortiori the number of individuals who would intervene in station proceedings outside their service areas must be so small as to defy survey by conventional means. Petitioner is concerned about the network problem; he has moved to intervene. The number of individuals who would follow if standing were to be granted must realistically be estimated to be minuscule. Thus, a favorable decision for Petitioner would have no practical effect on non-local intervention, while it would accomplish the important public purpose of examining the power and practices of the three national networks. When the benefits are thus juxtaposed against the minimal exposure to additional proceedings by similar individuals, the social cost effectiveness in favor of permitting intervention becomes overwhelming.

C. THE UNITED STATES SUPREME COURT HAS ALREADY RECOGNIZED AND ACCEPTED PETITIONER'S FORM OF PUBLIC INTEREST INTERVENTION.

The Supreme Court of the United States has already had occasion to consider and decide the right to intervene consumer oriented citizens, even when there are other adverse parties in the proceeding.

In Utah Public Service Comm. v. El Paso Natural Gas Co. 89 S. Ct. 1860 (1969), William M. Bennett, of San Francisco, California was listed in the court opinion as "Consumer Spokesman." Although he had no direct interest in the case in 1969, Mr. Bennett had represented the state of California during a part of the proceedings, Cascade Natural

Gas Corp. v. El Paso Natural Gas Co. 386 U.S. 129 (1967), and petitioned the Supreme Court to intervent in the 1969 proceedings as a Consumer Spokesman since he had been fired from his position by the state of California. Mr. Bennett pursued the matter on his own, as a representative of consumers in the several midwestern states affected, against seemingly insuperable legal and procedural obstacles, but was in the final analysis granted standing to intervene as a "Consumer Spokesman" representing no party but representing instead the consumer interest in the proceedings.

Similarly, Petitioner seeks to intervene in the network owned stations renewal proceedings to reflect and advocate the viewers, and consumers rights and interests in network operations.

Obviously, no two situations are exactly analogous. But the recognition by the Supreme Court that even with numerous adverse legal interests, the consumer's point of view might be left out or drowned out, which necessitated intervention by a "consumer spokesman," is impressive authority for "ombudsman-type" interventions by interested citizens in agency proceedings. Certainly if consumer spokesman status can be accorded and supported at the Supreme Court level, it should be acceptable and tolerable at the administrative agency level where important policies are supposed to be developed and reviewed.

POINT II

PETITIONER RAISED SERIOUS QUESTIONS OF FACT AS TO REQUIRE A HEARING ON THE LICENSE RENEWALS OF WABC-TV, WCBS-TV, WNBC-TV.

A. THERE IS PERSUASIVE AUTHORITY WITHIN THE COMMISSION ITSELF FOR THE PROPOSITION THAT THE PETITIONS REPRESENT SERIOUS AND IMPORTANT QUESTIONS WHICH OUGHT AND MUST BE DECIDED BY THE COMMISSION.

Concerning the 47 U.S.C.A. 309 (e) requirements of serious questions of fact before a hearing must be held, the Commission states "The petitioner has nowhere set forth facts that show the networks to be in violation of any law, Commission policy or rule.....But no such showing of serious questions is made here; rather, there is an absence of any specific showing of abuse, law violation or discernible overriding public interest concern.--footnote 3--...But, petitioner has made no substantive showing in this respect..," (Decision, p. 4).

The Commission has introduced a test of impossibility in making substantive showing. Network station profits are known only to the Commission because the Commission does not require public disclosure of network operating profits and losses; the networks, in response to the Petitions, refuse to make any response. Under the circumstances, it is impossible for petitioner to provide exact amounts and figures, although the plain effect of network operations is to erect oligopoly market barriers to entry which are obvious to any economist. By requiring the petitioner to make substantive showing above and beyond the facts publically available to petitioner, the Commission insures that no substantive challenge of network profits can ever be made by a member of the public.

All of the Commission reasoning is repudiated by authority within the Commission itself. Concerning the Commission decision, the dissent states: "...One would assume that the Commission's denial of petitioner's

requests without a hearing meant the Commission was confronted with clear issues totally devoid of any relevant problems. But that was not the case... In their opinion the majority does not correctly summarize the petitioner's allegations; it does not answer the substantial issues raised by the petitions; and contrary to law and precedent it refuses to set the issues for hearing so the questions can be resolved." (Dissent, p. 9.)

The petitions had discussed anti-trust law violations, reflecting station ownership and network affiliates. The petitions had discussed the Paramount Pictures (Petition, p. 7), case restricting producers of motion pictures from controlling distribution facilities. All three networks both produce their own feature films and distribute them over the television networks to over 90% of the American people. The petitions had discussed conflicts between objective news reporting and ownership of record producing companies, book publishing firms, sports teams, and substantial defense contracts by CBS and RCA. The petitions had stated that ABC, CBS and NBC not only controlled national networks and owned stations which could themselves reach roughly 19% of the national population, they had similar media holdings for both AM and FM radio, in effect controlling access and network development of three competitive media.

Petitioner had stated in the petitions "...raises three major issues for inquiry by the Commission; however, while some detail is provided as to the specific charges and violations which Petitioner feels the Commission should investigate, detailed citation of cases, authorities and precedents is left for the actual license renewal

hearing at which time Petitioner proposes to offer a full evidentiary presentation of his facts..,"(Petition, p. 3). The dissent states: "The majority also states that there is no showing that the renewal grant of these licenses would be inconsistent with the public interest." The Communications Act does not require that an absolute "showing" be made in a petition; rather, the mere presentation of "a substantial and material question of fact" necessitates a hearing. Petitioner has certainly met this minimum requirement.

Commissioner Johnson concludes his dissent with the observation: "If in all of these lengthy petitions--raising anti-trust, concentration and conglomerate issues, the majority can find 'no serious questions,' then I have little hope that these important issues will ever be addressed by this Commission. The allegations I have quoted, and comparable ones from the other two petitions, raise substantial questions as to these licensees' performance in the public interest. I do not believe this Commission has the legal authority to summarily dismiss such petitions without a hearing on their merits," (Dissent, p. 15).

B. THE PENDING RULE MAKING PROCEEDINGS REPRESENT AN INADEQUATE AND DILATORY RESPONSE BY THE COMMISSION TO ITS LEGAL MANDATE.

The Commission has, from time to time, instituted rule making proceedings to further clarify its policies. Because the Commission has not followed up on the proposed rule making, substantial and important areas of broadcast law have remained in an unclear and indefinite status for long periods of time, which necessitates the kind

of intervention proposed by the Petitioner in his license renewal intervention. A Commission proposal to limit network prime time ownership of programming was proposed almost five years ago, and still has not been resolved. The Department of Justice supported the "50-50" proposal in April of 1969 (Broadcasting, p. 68, May 5, 1969) and still no final action has resulted.

In 1968 the Commission proposed limitations on multiple ownership of broadcast facilities (33 Fed. Reg. 5315 (1968)). These rules have yet to be placed in final form almost two years later.

In 1969 the Commission proposed an inquiry into conglomerate ownership of broadcast facilities (16 F.C.C. 2d 436 (1969)) which has yet to result in any final action.

The Commission has continued to grant multiple ownership and conglomerate license renewals and appears to rely on the executory rulemaking proceedings as sufficient action consistent with its legal mandate, (Decision, p. 4). This would not seem to be a correct interpretation of the role of the Commission.

Pending rule making often has the net effect of delaying important decisions into the unforseeable future. All of the pending proposals have yet to be placed in final form by the Commission, let alone face inevitable challenge from the broadcast industry. While no administrative agency can provide immediate action, endless delay prejudices the important rights of the public and necessitates case by case intervention by consumer oriented individuals.

The licensees prefer to abide with the pending rule making since it essentially freezes any meaningful action by the Commission and prevents public intervention. This is not a reasonable policy for the Commission to adhere to since it places incumbent licenses in a protected position for an indefinite period of time without allowing for any resolution of important policy questions. Under the circumstances, and in view of the overwhelming economic and anti-trust arguments present in network ownership and control of individual stations, the Commission should not be allowed to rely on what are apparently interminable and possibly speculative proceedings to bar Petitioner's request for determination of these issues with regard to the three major networks.

C. CITIZENS SHOULD HAVE THE RIGHT TO PRESENT NETWORK QUESTIONS IN PROCEEDINGS DIRECTLY CONCERNING NETWORK INTERESTS INSTEAD OF PENALIZING LOCAL STATIONS.

The Commission has suggested in its decision that Petitioner ought to take issues concerning programming to local network affiliates in Illinois (Decision, p. 3). Although, as indicated below, no programming issues were ever presented to the Commission, the argument should also be dismissed because is poses an unfair burden for local stations. Under the current system of network programming and affiliations throughout the United States, which the Commission itself endorses in the decision, local stations have limited to non-existent leverage and influence over network programming decisions. It would be an

unreasonable and unconscionable burden on any local station to face challenges because of its network programming, when the affiliation may be essential for competitive and economic survival. In actual practice, affiliates have no more control over network policy than members of the public.

In the case of economic attack on network policies, moreover, the Commission is silent. This may be taken to suggest that economic arguments, such as those advanced by the petitioner, must only be advanced against network owned stations. It will certainly have no effect on WABC-TV, or WCBS-TV, or WNBC-TV, for the local Illinois network affiliates to be challenged because of network ownership of stations in other markets. If the Commission position is followed to its logical conclusion, then network programming practices must be challenged through punitive proceedings against a single (local affiliate) and there is no realistic way that a member of the public can challenge economic concentration in network ownership and operations. This is not a logical or consistent result and must be disregarded.

It is certainly reasonable for challenges of network ownership and operations, and the chilling effect of established network policies on new network development and overall competition, to be directed at network owned stations. Petitioner has no economic quarrel with his local stations, since all three affiliates only clear what they are provided from New York. Petitioner has directed a special, limited challenge at economic concentration and the effects of network station ownership on broadcasting competition. These issues can only be resolved

in direct hearing of network owned stations. To deprive the Petitioner of a right to challenge economic concentration at the core, is to deprive the Petitioner (and derivitatively any members of the public or public group) of any remedy against network anti-trust policies merely because of an accident of residence which places petitioner outside the local service area of a network owned station.

It is only logical that network issues should be resolved in the context of network proceedings; it seems reasonable to suggest that arguments concerning network practices and concentration of media control should be directed at network owned stations.

D. THERE IS SUBSTANTIAL PUBLIC AUTHORITY FOR THE POSITION TAKEN BY PETITIONER IN RAISING HIS ECONOMIC ISSUES CONCERNING NETWORK POWER.

In a speech in Des Moines, Iowa, on November 13, 1969, the Vice President of the United States criticized network news policies and, concerning network power stated: "Is it not fair and relevant to question its concentration in the hands of a tiny and closed fraternity of privileged men, elected by noone, and enjoying a monopoly sanctioned and licensed by the government?" (Broadcasting, November 17, 1969, p. 28.) Speaking a week later, the Vice President questioned a "trend toward the monopolization of the great public information vehicles and the concentration of more and more power over public opinion in fewer and fewer hands." (Broadcasting, November 24, 1969, p. 44.)

The petitions dismissed by the Commission had been filed in May, 1969, almost six months before the Vice President's speech. Yet they involve substantially identical issues concerning concentration of media conflicts inherent in network ownership of stations and defense department production, sports team ownership, book publishing and other unrelated interests which may be in conflict with broadcasting in the public interest.

The national response to the Vice President's remarks appears to indicate that there is a substantial segment of public opinion of all political persuasions which subscribes to the intent of petitioner's efforts at the Commission, namely to open up the broadcasting industry to additional competition by diligent and timely enforcement of anti-trust laws and restrictions on economic concentration. Although there appears to be a substantial body of public opinion that the national networks exercise too much econcomic power, the rule making proceedings and narrow standing rules of the Commission have effectively barred the public from enforcing anti-trust laws and effecting legitimate public policies through intervention in Commission proceedings. Clearly, although petitioner's efforts were directed at the Commission almost six months before similar efforts by a senior public official, the substance of the arguments is almost identical.

The Commission, moreover, would unlikely suggest that the Vice President direct his comments and charges at local Washington, D. C. network affiliates which "remain fully responsible for all programming presented," (Decision, p. 3). The Vice President was correct in assessing that affiliates have no more influence over network programming than the

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public, and that to have any meaningful effect on network policies, direct challenges to network ownership and policies must be made by members of the public.

The Court in the United Church of Christ (1966) case implicitly anticipated such a situation when it stated, with regards to consumer intervention, that "(public participation)...is also desirable in that it tends to cast governmental power, at least in the first instance, in the more detached role of arbiter rather than accuser..." at 1003. Thus, it is only when artificial standing rules of the Commission inhibit consumer participation that political intervention is encouraged. In the instant case, for example, petitioner made the allegations of fact as an individual consumer and citizen representative, and future events appear to have borne out the proposition that a significant segment of the public--both "liberal" and "conservative" is dissatisfied with Commission policies and action and the constantly growing economic and media power of the networks. Independent citizen participation at the Commission should be encouraged by the Commission, and by Commission rules and actions, if political officials are to be spared the temptation to intervene in "media politics."

E. THE COMMISSION MISINTERPRETED AND MISSTATED PETITIONER'S PETITIONS SO AS TO FACILITATE THEIR DISMISSAL.

One of the ways in which the Commission has discouraged citizen participation is to suggest that if barriers to citizen participation are lowered, the Commission will be inundated by consumer interest

petitions. A crucial defense of the Commission in the United Church of Christ (1966) case was that if the Church and similar groups were permitted to intervene, the Commission would be inundated by similar efforts. Over three years after the decision, the fears of the Commission do not appear to have materialized, but the identical arguments, replete with dramatizations re-present themselves in the instant Commission action.

"Elimination of all networking..would of course..." (Decision, p. 3) is the way the Commission decision refers to Petitioner's arguments. "There is no showing that such a drastic occurrance would benefit petitioner or the millions of viewers of network television..." Nothing in the Petitioner's petitions states, suggests or in any way involves elimination of network programming or other "drastic occurrances." Rather, the suggestions of Petitioner are directly related to the opposite goal, encouraging new network formation by removing the artificial economic support for established networks provided by station ownership. By trying to cast petitioner's arguments as blanket opposition to networking, the Commission is relying on pure sophistry and misrepresentation to support its position.

It is clear that station ownership is the major barrier to new network formation, not, as the Commission suggests, "multiple ownership," as such. Broadcasting Magazine reported (January 6, 1969, p. 45 et seq.) that networking profits per se amounted to roughly 56 million dollars, while network owned and operated station profits contributed over 104 million dollars to pre-tax income in 1967. The dominance of the networks is supported not by financial acumen, but by the built-in dominance of established station ownership when joined to networking profits. Seen

in this light, the Commission's oft-repeated (Decision, p. 4) offer of waiving multiple ownership restrictions is meaningless, since the issue is not the scarcity of VHF licenses itself which inhibits competition, but ownership of scarce major market VHF licenses by the national networks.

In his petitions, the Petitioner specifically requested a hearing on three narrow issues: (Petition, p. 12) anti-trust violations, concentration of media power, and conglomerate conflicts of interest. Petitioner states: "..respectfully requests a hearing on these matters and only these matters." The Petitioner then states; "<u>If the Commission should rule that the entire broadcast record of</u> (the station) <u>must be considered, then Petitioner respectfully reserves the right to amend and supplement this petition...</u>"

In what can only be a distortion of the plain intent of the Petition--to develop and discuss three limited clearly defined issues concerning economics--the Commission reports in its decision: "...CBS and ABC are accused of (Decision, p. 3) ..." The Commission places in a footnote the caveat of the petitioner, and then goes on to disregard it. Item 7 in the Commission decision begins, "With regard to petitioner's programming criticisms, (Decision, p. 4)...." The Commission further states in Item 5 of the decision, "the petitioner alleges" and then goes on the discuss programming criticisms, (Decision, p. 3). It is not clear from reading the decision if the Commission was in fact considering Petitioner's petitions, or indeed chosing to ignore the plain meaning of the petitions and intending instead to substitute Commission issues for those which had not in fact been presented. Ignoring repeated public criticisms and comments by members of the Commission itself, the majority

then states that the original petitions were "replete with pejorative language, highly individual opinions and unsubstantiated accusations.," (Decision, p. 4). The Commission clearly is not performing its proper adjudicatory function, and when faced with reasonable challenges in proper form, is resorting to subterfuge and innuendo to dismiss serious questions which are contained in the petitions and which reside in the minds of the American public. The petitions requested a hearing on three narrow issues of economic importance. The Commission ignored this limitation, self-imposed by the petitioner for administrative clarity and ease of interpretation, and chose to issue a blanket decision unrelated to any of the substantive issues raised in the petitions themselves. This is hardly a "highly individual" opinion or interpretation of the plain English in the petitions.

POINT III

THE INFORMAL ADJUDICATION BY THE COMMISSION IS VOID AND CONSTITUTES AN ABUSE OF ADMINISTRATIVE PROCESS

A. THE COMMISSION BROUGHT INTO ISSUE ITEMS WHICH WERE PRESENTED ON A DISCRETIONARY BASIS WITHOUT ANY OPPORTUNITY FOR DISCUSSION OR REBUTTAL BY PETITIONER.

In the plain language of the petition, Petitioner had requested a hearing on three narrow specific economic issues. The petitions had indicated that if the entire broadcast record were to be considered in the renewal hearing, Petitioner wished to have an opportunity to amend and supplement his petitions. The petitions themselves contain

no allegations of programming practices, although they contain suggestions of areas in which Petitioner might wish to amend and supplement his petition.

The Commission in its decision ignored this restrictive language and wnet on to make a lengthy defense of its programming policies. On the one hand it stated: "To the extent that petitioner bases his standing on challenges concerning the programming he has been receiving, such challanges should be directed at the stations from which he is receiving service," (Decision, p. 3). Further on in the decision, the Commission states: "...it has long been our policy that the selection and presentation of programming is essentially a matter within the sound discretion of the individual licensee. We cannot deal with the blanket charge that network programming is "unimaginative," "unentertaining," or "geriatric," (Decision, p. 4). The Commission clearly shows a conflict between initially dismissing network programming questions and suggesting local program protests, and then ignoring its own advise and declaring its policy on network programming, which is a policy of abstention.

What is more important is the mental attitude which the Commission exhibits. It talks of "blanket charges," (Decision, p. 4). No charges were made. All of this is almost identical to problems encountered by the successful intervenors in the UCC case, where, as the 1969 decision pointed out: "Once again we see the pervasiveness of the original error in confusing mere 'allegations' and testimonial evidence--evidence which if not contradicted by the licensee's evidence, or on its face incredible, was entitled to carry the day in terms of establishing the point to which

it was directed." Petitioner made no "blanket charges," yet the Commission found them, apparently only so that it could dismiss them. Petitioner merely pointed out areas in which his petitions might be expanded if the Commission so ordered, but in no way did Petitioner make programming charges. The Commission's response to the non charges is indicative of the Commission's desire to concoct problems if only to dismiss them, and cast public intervenors in a bad light. It would be surprising only if it were the first time this had happened; regrettably it has become a way of life at the Commission.

Similarly, using the standards developed in the second UCC decision, the petitions clearly contained allegations concerning economic practices of the networks which were not "incredible" on their face. The networks refused to respond. If the reasoning in UCC is followed, the Commission should have given some weight to Petitioner's arguments concerning economic concentration. It would seem that the statements, in the absence of and refusal by the networks to respond, should have been "entitled to carry the day in terms of establishing the point to which it was directed." Unfortunately, even in the absence of any reply by the networks, the Commission apparently resolved all of the charges in a fashion to brand them "incredible." Such action by an administrative agency charged with the awesome responsibility of regulating the nation's broadcast media is in itself incredible.

B. THE COMMISSION EXHIBITED A CONFLICT BETWEEN ITS OWN INTERNAL REASONING IN FIRST DISMISSING THEN ADJUDICATING THE PETITIONS IN AN ARBITRARY AND CAPRICIOUS MANNER.

The Commission stated in its decision: "We find that Martin-Trigona has not demonstrated that he has standing as a party in interest in this matter, (Decision, p. 3). Under normal and reasonable administrative procedure, this would appear to be the end of the matter, until an appeal could be brought or the issue dropped. Yet, in a novel display of administrative and bureaucratic reasoning, the Commission decision continued: "We will, however, briefly discuss the petitioner's claims, since as we have stressed, we welcome and examine complaints from the listening public in line with the statutory obligation. (see Section 311 (a))," (Decision, p. 3). The Commission then proceeded to deny each and all of the Petitioner's allegations, including those not made, and to completely discredit all of the detailed preparation without any opportunity for the Petitioner to answer or respond to this dismissal cum adjudication.

This can only be considered abuse of administrative process.

No administrative tribunal has the right to dismiss petitions, and then, having denied Petitioner an opportunity to participate, to "dismiss" or "adjudicate" the contents of the petitions.

Such elements of fairness do not need recent standing decisions to justify their imposition on the arbitrary and capricious Commission majority. As far back as 1903, the Supreme Court held that petitioners were required to be given a fair opportunity to petition. In any proceeding where the substance of a petitioner's arguments are at issue, an individual has a right to be present and participate in the proceeding. In Consolidated

Edison Co. v. N.L.R.B. 305 U. S. 197 (1938), the Supreme Court held that the refusal of the N.L.R.B. to receive the testimony of certain witnesses wnet to the very fairness of the hearing: "(T)he refusal to receive the testimony was unreasonable and arbitrary...Assuming, as the Board contends, that it had discretionary control over the conduct of the proceeding, we cannot but regard this action as an abuse of discretion," at 226. In Londoner v. City and County of Denver, 210 U.S. 373 (1903), the Court voided a tax assessment because a "fair hearing" had not been held. The opportunity to present oral argument was held to be a requirement of a "fair hearing." The court stated:

> From beginning to end the landowners, although allowed to formulate and file complaints and objections, were not afforded an opportunity to be heard upon them...(D)ue process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, at 385....
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> (An administrative) hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be by proof, however informal, at 386.

In his dissenting opinion, Commissioner Johnson recognized the dimensions of the problem when he stated (Dissent, p. 1): "The Commission, in ordering a study of conglomerate broadcasters, has recognized that a problem exists, but here summarily dismissed petitioner's contentions... but, perhaps as a sop to a reviewing court, the merits are mentioned and quickly rejected."

It is difficult to respond to action such as the Commission has taken, because it is difficult to comprehend. An administrative agency dismisses a petition for lack of standing, and, without affording any

opportunity for participation, proceeds to reject the merits of the arguments made and arguments not made. Whether as a "sop to a reviewing court," or for any other arcane reasons known only to the Commission, such action clearly constitutes an abuse of administrative process. Petitioner filed good faith petitions. He was prepared to appeal if dismissed for lack of standing. He was not prepared to be dismissed and then adjudicated, without any opportunity to present or rebut data, evidence or allegations. All of this is even more difficult to comprehend when it is recognized that the networks refused to respond to the substantive pleadings of the petitions, and that the Commission, faced by stubborn refusal to participate on the part of the licensees, and unwilling to permit intervention by the petitioner, acted as plaintiff, defendant and judge. The Commission did not act in good faith.

Any tribunal, whether administrative or judicial, can only gain respect and recognition when it acts in accordance with accepted standards if justice and with proper regard for its own rules. The action of the Commission in denying, then rejecting is difficult to comprehend but it speaks to the very real problems that the public interest has surviving in such proceedings. The Commission recognizes that the petitions are meritorious and should be heard under the legal mandate and in accordance with the dissent. For esoteric reasons, it is unwilling to act in proper accordance with its duty, and attempts to "discuss" or "adjudicate" while dismissing, thus having the benefit of having "acted" on petitions while being spared the burden of examining and adjudicating their substance. Clearly the petitions were of such a compelling nature that the Commission, mindful of its legal responsibility and minority sentiment within the

Commission itself, knew it could not disregard the petitions entirely. But the action of the Commission, in dismissing, then "welcoming ... complaints..." and then dismissing the merits of the pleadings and pleadings not yet made, reflects grave question on the fairness or competance of the Commission to fulfill its awesome and sensitive responsibilities.

CONCLUSION

For the forgoing reasons, the rulings under review should be reversed and a hearing should be ordered on the license renewals at issue.

Respectfully submitted,

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